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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 559

WILLIAM D. DRISCOLL,
Petitioner,

vs.

TOLEDO BLADE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. _____.

WILLIAM D. DRISCOLL,

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vs.

TOLEDO BLADE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner herein, William D. Driscoll, prays that a writ of certiorari issue to the Supreme Court of the State of Ohio for review of the judgment of the Court of Appeals of the Sixth Appellate District of Ohio for Lucas County, Ohio, entered January 4, 1966.

The Supreme Court of Ohio on June 8, 1966, refused review of the said judgment of the said Court of Appeals as one presenting a constitutional question or a matter of general public interest.

The Supreme Court of Ohio denied an application for reconsideration and rehearing on July 20, 1966; and, thereupon, the judgment of the said Court of Appeals became the final judgment of said courts and the law of Ohio on said date, July 20, 1966.

OPINION BELOW.

The opinion of the Court of Appeals of Ohio, Sixth Appellate District for Lucas County, Ohio, is reported in 3 Ohio Appeals, Second, 351 and in 210 Northeastern, Second, 899. Said opinion appears in the Appendix hereto at page 39. The final judgment appears in the Appendix at page 64.

STATEMENT OF JURISDICTION.

The judgment of the Court of Appeals was entered January 4, 1966. Appeal upon leave on questions of law to the Supreme Court of Ohio on constitutional grounds and as a matter of general public interest was denied June 8, 1966. The Supreme Court of Ohio denied reconsideration and rehearing on July 20, 1966.

The jurisdiction of this Court is invoked under 28 United States Code, 1257(3) and Rule 19(a) of the Rules of the Supreme Court of the United States, said rule providing for review by this Court on a writ of certiorari, "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The Ohio courts of last resort have denied the petitioner his constitutional rights to property and due process guaranteed to him and provided by the Constitution of the United States and the Constitution of the State of Ohio, in that the Ohio courts of last resort have failed to give effect to Article I, Section 11, of the Bill of Rights of the Constitution of the State of Ohio and to Article I, Section 5, of the Constitution of the State of Ohio and to Article I, Section 16, of the Constitution of the State of Ohio and thereby have deprived the petitioner of his constitutional rights to property and due process guaranteed to him by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED.

1. Did this Court in the case of *New York Times Co. v. Sullivan*, 376 U. S. 254, determine a new and different rule in regard to the weight of the evidence in an action in libel by a public official, that is, beyond the preponderance of the evidence?

2. Does the First Amendment to the United States Constitution, as interpreted by this Court in *New York Times Co. v. Sullivan*, 376 U. S. 254, and applied by the Ohio appellate court grant a right or privilege to a malicious liar to publish, concerning a judge, false, defamatory statements of facts with actual malice and then sanction as fair comment publications of false, defamatory conclusions with actual malice predicated on said false, defamatory statements of facts?

3. Does an appellate court upon error-review of a libel action brought by a judge violate the inviolability of the right of trial by jury as provided by Article I, Section 5, of the Constitution of Ohio and the due-process clause and the right-of-property clause of the Fourteenth Amendment of the United States Constitution, when said appellate court distorts the trial record by including as evidence facts not in the record and by excluding from the record evidentiary facts contained therein to rationalize the setting aside of a verdict and judgment thereon for the plaintiff-judge and to enter final judgment for the defendant?

4. Where the trial of a civil libel action brought by a public official results in a verdict for the public official, eleven of twelve jurors concurring, and the trial judge entered judgment on the verdict overruling the defendant's motions for judgment notwithstanding the verdict and for a new trial, there being proof by at least the preponderance of the evidence in support of all issues to be

proved to sustain the verdict and judgment thereon, may the appellate court substitute its conclusions of facts contrary to the verdict and judgment of the trial court and enter final judgment for the defendant without depriving the public official of his constitutional rights guaranteed by Article I, Section 11, of the Bill of Rights of the Constitution of the State of Ohio, Article I, Section 5, of the Constitution of the State of Ohio and Article I, Section 16, of the Constitution of the State of Ohio, and thereby, Section 1 of the Fourteenth Amendment to the United States Constitution?

5(a). When a newspaper publishes of a judge in its editorial complained of,

> "On three occasions he imposed Workhouse sentences when none were provided by law. Once he had arrested, booked and fingerprinted a prospective woman juror who, through a misunderstanding, failed to show up for duty—only to excuse her in the end. Another woman juror was ordered brought to the courtroom from her sickbed, on a stretcher. He once insisted that a juror swear under oath that his father, in fact, had just died. And there was that remarkable period during which Judge Driscoll erroneously concluded that the city ordinance covering drunk driving penalties was unconstitutional, and refused to pass on 45 cases until the Supreme Court overruled him.
>
> "In all of this Judge Driscoll's legal motives were of the highest. But his methods of executing them were extreme, brutal and unnecessary."

are such statements of a judge defamatory per se?

5(b). When there is proof by at least the preponderance of the evidence and the jury found that said statements were published with actual malice, and it is admitted by the defendant and adopted by the appellate

court that the woman juror referred to was not brought to the courtroom on a stretcher, does the appellate court abuse its discretion and commit prejudicial error in setting aside the verdict and judgment thereon in favor of the judge and in entering final judgment for the publisher and in dismissing the admitted falsehood published with actual malice with a comment, "This error, on the facts, is unimportant"?

5(c) Does the statement in the said editorial that the petitioner was "brutal" constitute a defamatory falsehood in support of a verdict and judgment thereon for the petitioner, when the facts upon which the statement is predicated that the petitioner ordered a woman juror "brought to the courtroom from her sickbed on a stretcher" *is an admitted lie published with actual malice?*

6. In a libel action by a judge against a newspaper, where the trial judge in the general charge and in separate special instructions requested by the defendant (defendant's requests 12 given as 4, 13 given as 5, 15 given as 10, 16 given as 13) instructs the jury that in order for the plaintiff to maintain his action he must prove by the preponderance of the evidence that the publications complained of were defamatory, were false and were published with actual malice, that is, with knowledge that they were false or with reckless disregard of whether they were false or not, does the trial court commit prejudicial error against the defendant in refusing its various requests that a finding of certain negligent acts of omission or commission, as appeared in *New York Times Co. v. Sullivan,* would not warrant a verdict for the plaintiff, and when the trial court observed that said requested instructions would be misleading and confusing to the jury, in that they did not include a statement of the basic rule of the case of *New York Times Co. v. Sullivan,* warrant the ap-

pellate court to reverse the verdict and judgment for the plaintiff and enter final judgment for the defendant without violating the constitutional rights of the plaintiff as provided for in Section 1 of the Fourteenth Amendment to the United States Constitution?

7. When the state statutes (Ohio Revised Code, Sections 2739.13 to 2739.18) provide, as a condition precedent to a *criminal action* for libel, that the complainant serve the publisher with an affidavit stating the true facts, that the publisher thereupon is required to publish the facts as stated in the affidavit and is not responsible for publishing falsehoods contained in said affidavit, that if the publisher fails upon demand to publish the facts stated in the affidavit, the publisher is subject to criminal prosecution and punishment for said failure and the statute (Ohio Revised Code, Section 2739.14) further provides,

> "and such publication may be proved at the trial of a suit for damages as a mitigating circumstance to reduce damages, provided that any voluntary publication made without demand may be used to rebut any presumption of malice or injury on the part of such company growing out of the original publication to which the same related. *This section does not prevent the injured party from alleging and proving actual malice on the part of the publisher and any special damages resulting to him therefrom.*" (Italics supplied.)

does the appellate court commit prejudicial error toward the public official in holding that, although the public official repeatedly in writing advised the publisher that the publications were false, the public official's failure to furnish a corrected statement under oath to the publisher of defamatory, false statements published with actual malice concerning the said official is a bar in a civil action in libel,

although not pleaded, to recover damages by the public official against the publisher of the defamatory falsehoods published with actual malice concerning the public official?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, *or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws." (Italics supplied.)

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article I, Section 11, of the Bill of Rights of the Constitution of the State of Ohio, provides:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of the right;* and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall

appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted." (Italics supplied.)

Article I, Section 5, of the Constitution of the State of Ohio, provides:

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

Article I, Section 16, of the Constitution of the State of Ohio, provides:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, *or reputation,* shall have remedy by due course of law, and shall have justice administered without denial or delay." (Italics supplied.)

The statutory provisions involved in this case are pertinent only because the opinion of the Appellate Court involved them. They are Ohio Revised Code Sections 2309.59, 2313.16, 2313.17, 2317.04, 2317.05, 2739.01, 2739.02, 2739.13, 2739.14, 2739.15, 2739.16, 2938.12, 2945.12, 4511.06, 4511.19 and 4511.99 and Section 21-6-9, City of Toledo Traffic Code, all of which are set forth in the Appendix hereto commencing at page 67.

STATEMENT OF THE CASE.

Introduction.

This case presents the other side of the coin of libel examined by this Court in *New York Times Co. v. Sullivan*, 376 U. S. 254. It presents a headlong confrontation between the freedom of the press provided for in the First Amendment and protection of property rights and due process guaranteed by the Fourteenth Amendment under the guidelines and standards announced in *New York Times*.

It puts in issue whether any elected public official, and particularly in this instance a judge, has any legal recourse for publication of defamatory, false statements published with actual malice concerning him in his profession.

Here the petitioner, William D. Driscoll, was a judge of the Toledo Municipal Court. He had been a dedicated public servant—city councilman for two years, assistant county prosecutor for almost six years and assistant city law director engaged in trial and appellate practice for six years. The governor of Ohio appointed him to the judgeship for an unexpired term beginning January 12, 1960 and ending December 31, 1961.

The respondent, Toledo Blade Company, was and is the publisher of the only two daily newspapers published in the Toledo area, The Blade, an afternoon and evening paper, and the Toledo Times, a morning paper.

The evidence shows a cool, calculated conspiracy engaged in by respondent's officers and employees falsely to defame the petitioner as a lawyer and judge and thereby to defeat him for election November 7, 1961. In this connection, Prosecuting Attorney Gordon Holder testified to a spiteful declaration by Mr. Clifford Quinn, respondent's

police reporter, indicative of an intention deliberately to defame the petitioner (R. 161 to 165). When Mr. Holder said he could find nothing objectionable (R. 162) in a transcript of proceedings before Judge Driscoll, Mr. Quinn asked Mr. Holder belligerently, "You want some of the same treatment?" (R. 163.) Moreover, respondent's president, publisher and principal stockholder, Paul Block, Jr., admitted (R. 579) that the respondent was using the means complained of (false defamation) "among many others" to defeat Judge Driscoll for office and to make any corrections in the dafamatory statements, which he admitted were false, would be unfair to the respondent (R. 586) and also because Judge Driscoll might sometime again stand for public office (R. 595).

The three publications complained of, an editorial and two advertisements, each constituting a separate cause of action, are quoted in part in the opinion of the Court of Appeals (Appendix, pp. 41-45) and are incorporated herein by reference. They incorporated falsifications of false, defamatory statements in news items and editorials previously published by the respondent with actual malice over a period of several months, notwithstanding that the petitioner and others on several occasions, months before the publications complained of, advised the respondent's president and publisher, Paul Block, Jr., and its other accredited representatives orally and in writing that the defamatory statements of fact concerning the petitioner were false. The record shows that the petitioner sent two letters to the publisher (Plaintiff's Exhibits 1 and 11) and even paid for an advertisement (Defendant's Exhibit N) in respondent's paper identifying the false, defamatory statements of fact which were set forth in the publications complained of.

This case was pleaded and tried in conformity with

the pronouncements in *Westropp v. E. W. Scripps Co.* (1947), 148 Ohio St. 365, as subsequently modified on March 9, 1964 by this Court's decision in *New York Times Co. v. Sullivan* (1964), 376 U. S. 254. Trial began April 14, 1964.

Unlike in *New York Times Co.*, here the respondent relied upon and published the false defamatory facts in its files (R. 1071, 1081) and even falsified those false facts. (Defendant's Exhibit U, R. 404, 1091, 1092.)

Unlike the trial court in *New York Times*, the trial court here charged several times that the plaintiff could not recover unless the evidence proved that the publications complained of were defamatory and false and were published of the plaintiff by the defendant with actual malice, that is, with knowledge that they were false or with reckless disregard of whether they were false or not.

Also unlike the trial court in *New York Times*, the trial court here differentiated compensatory and punitive damages. The prayer was for $200,000 compensatory damages and $300,000 punitive damages. The jury returned a verdict of $150,000 for compensatory damages including attorney fees, and $200,000 for punitive damages. The trial court entered judgment on the verdict and overruled motions for judgment notwithstanding the verdict and for a new trial. The Court of Appeals, avoiding and distorting the evidence in the record, reversed and entered an expedient final judgment for the defendant (Appendix, pp. 39-66). The Supreme Court of Ohio refused review on the constitutional issue and also as a matter of general public interest. The Supreme Court of Ohio also denied reconsideration and rehearing on July 20, 1966.

Here, again in Ohio, the press by its abuse of freedom has nurtured its oligarchic power to dominate the elected judiciary by fear and favor, rule or ruin.

Falsity of the Statement, "Another Woman Juror Was Ordered Brought Into the Court Room From Her Sick Bed on a Stretcher."

The editorial of November 2, 1961, "For Municipal Judge" and which is the gravamen of the first cause of action, stated concerning the plaintiff and referring to Julia G. Brown, "Another woman juror was ordered brought into the court room from her sick bed on a stretcher." The said editorial, having reference to this false statement, went on to state his methods "were extreme, *brutal* and unnecessary." The Court of Appeals stated in its opinion (Appendix, p. 69, 3 O. App. 2d, at 368), "This error on the facts is unimportant."

The evidence was (R. 221 to 227, 454 to 468) that Judge Driscoll never ordered Julia G. Brown into court. Petitioner instructed the bailiff to contact said Julia G. Brown to ascertain the reason for her absence and never issued any writ for, or otherwise ordered her appearance. Thereafter, she appeared in open court, *not* on a stretcher *nor* in a leather harness (R. 457) as knowingly and falsely represented in the news stories concerning the incident. (Defendant's Exhibit U, R. 404, 1091, 1092.) Upon her appearance in open court and upon giving cause under oath therefor, as required by law, Ohio Revised Code Section 2313.16, petitioner, Judge Driscoll, ordered that she be excused from further jury service for good cause shown (R. 458).

The petitioner, Judge Driscoll, testified at length to the occurrences in regard to the falsity of the matter of the prospective juror being ordered into court (R. 221 to 227).

Mrs. Julia G. Brown also denied that she was brought in on a stretcher or was ordered into court (R. 457 to 458). She testified (R. 457):

"Q. You were on a stretcher, were you?

A. No, sir.

Q. Did you walk in?

A. Yes, sir, with aid.

Q. And did you have any orthopedic devices, or any crutches, or anything like that, that anyone could see?

A. I had an orthopedic corset.

Q. Well, was there anything that anyone could see on you? What I am trying to do, there was no outside brace or anything, it was a corset that you wear under your dress, is that right?

A. It was an undergarment, yes, sir.

Q. This was in the summertime?

A. Yes, sir.

Q. And this corset of course wasn't apparent from the outside, was it?

A. No, not in its structure."

Deputy Bailiff Gerald G. Graves testified (R. 471) that Mrs. Brown did not come to court on a stretcher *nor in any visible brace,* that she came voluntarily, that Judge Driscoll instructed him to contact her as to her failure to appear for jury duty (R. 473). He testified that he obtained a writ of attachment at his own instance from the clerk, who issued it without any order from, or knowledge of, Judge Driscoll (R. 473).

Clifford Quinn, the respondent's reporter, was present in the corridor and interviewed Mrs. Brown (Quinn R. 662) and, therefore, knew she did not appear in a "steel and leather harness" as reported in the news item in reference to this incident (Defendant's Exhibit U, R. 404, 1091, 1092).

The publisher, Paul Block, Jr., testified this misrepresentation of fact was false (R. 556).

Also, Editor Charles Gilmore, the admitted author (R. 1079, 1081) of the editorial containing the statements,

particularly with respect to brutality, testified that the statement was false (R. 1091, 1092). Charles Gilmore further testified (R. 1085) that the statement of fact in his editorial came to his knowledge from the files of the Toledo Blade. He stated he never has been able to locate the news clipping upon which he based his statement of facts (R. 1097, 1099, 1110) (the false news items concerning the incident were in the file) (R. 1099-1100), and that he concludes, he "received that information from somebody else verbally and applied it to the facts of the case." (R. 1085.) He stated, "I have been told it was a metal and leather harness" (R. 1091). He admitted that he was told that subsequently by the attorneys for the Toledo Blade Company several days before the trial (R. 1092) and also by John Willey, assistant to the publisher (R. 1099).

Falsity of the Statement, "Once He Had Arrested, Booked and Finger Printed a Prospective Woman Juror, Who Through a Misunderstanding, Failed to Show Up For Jury Duty, Only to Excuse Her in the End."

The editorial of November 2, 1961, "For Municipal Judge," having reference to the false statement, "Once he had arrested, booked and finger printed a prospective woman juror, who through a misunderstanding, failed to show up for jury duty, only to excuse her in the end," went on to state his methods "were extreme, *brutal*, and unnecessary." The statement concerned the petitioner, Judge Driscoll, and the woman juror referred to was Leila M. McGrath.

Petitioner, Judge Driscoll, testified he had no independent recollection of Leila M. McGrath contacting him to be excused from jury duty (R. 366). He testified he did recall that a venire, of which she was a member, was called for jury service for May 4, 1960, and that he anticipated

and represented to the venire the cases as pending for jury trials from May 4, 1960 to May 10, 1960, would not come to jury trials (R. 366) and that if she did contact him to be excused he may have told her that she would not be required for service on May 4, 1960. He testified further and the evidence shows he did not excuse any prospective juror except as provided for by Revised Code Section 2313.16, which requires that excuses from jury service must be made under oath by the prospective juror or another person acquainted with the facts constituting excuse from jury service as provided in said section.

He further testified, and additional testimony by Attorney Stephen Markowski is, that when her name was called, counsel for the defendant in said case, including Stephen Markowski, had been and were reserving a challenge to the array (R. 1220, 1221). When Mrs. McGrath did not appear for jury service on May 10, 1960, and Attorney Markowski and his co-counsel in the pending case did not waive her appearance, Judge Driscoll signed a writ of attachment for her presence and not a criminal warrant (Defendant's Exhibit ZZ). The police reported she could not be found (R. 362, 371). After a long delay in the then pending trial, counsel for the parties waived her appearance and the trial proceeded.

Early that evening her attorney, John Curphey, appeared and met Judge Driscoll to arrange to have proceedings against his client, Leila M. McGrath, for contempt of court, abated (Driscoll R. 259 to 265, 364, McGrath 938 to 941, Driscoll 1251 to 1254). Judge Driscoll arranged to have the writ returned to him personally as the court and signed an entry ordering her release upon her execution of a personal recognizance bond of $50.00. Mr. Curphey called Mrs. McGrath who arrived with her husband in their car (R. 938) and not under arrest. In the mean-

time Judge Driscoll ordered the police to bring the writ to him, as the court, at the Safety Building. The police, with the writ, arrived soon after Mr. and Mrs. McGrath. Judge Driscoll took the writ from the police (R. 263) and gave it to the clerk who proceeded to prepare the personal recognizance bond. Judge Driscoll remained until after 6:00 P. M. to await her appearance and to arrange for the return of the writ to him, as the court, and to abate any further proceedings pursuant thereto. Thereafter, the police officers (R. 1252, 1254) without any order from Judge Driscoll, without his knowledge and after he had left the building, and contrary to his orders (R. 364), booked and fingerprinted Mrs. McGrath, treating the writ of attachment as a criminal warrant for arrest. In the next subsequent jury trial, Mrs. McGrath served as a juror and upon completion of said service Judge Driscoll discharged her from further jury service.

The falsity as well as the malice in these foregoing misrepresentations of fact having reference to Leila M. McGrath are demonstrated not only by the testimony of Judge Driscoll (R. 259 to 265, 1251 to 1252), but also by respondent's witness, Leila M. McGrath, herself (R. 938 to 943).

Falsity of Statements, "On Three Occasions He Imposed Workhouse Sentences Where None Was Provided by Law," "Judge Imposes Jail Sentences Contrary to Law."

From the above false statements of fact, the respondent stated in the editorial of November 2, 1961, "For Municipal Judge," "His methods * * * were extreme, *brutal* and unnecessary."

The three defendants to which respondent referred were identified by Paul Block, Jr., president and publisher

of The Toledo Blade Company, under oath in his answer to petitioner's Interrogatory No. 12. In his answers to Interrogatories 26, 27 and 28, he stated under oath that Judge Driscoll sentenced each of said defendants, Duane C. Wanamaker, Raymond J. Baranoski and Harold L. Wainscott, to the Workhouse.

The respondent's news article (Defendant's Exhibit D, R. 316, 390) and the uncontroverted testimony of Judge Driscoll (R. 230 to 245) and the uncontroverted testimony of Deputy Clerk of Courts Paul Nauman (R. 680 to 710) are that none of said defendants was sentenced to imprisonment. Baranoski and Wanamaker were each fined. The cases of Wainscott were passed by Judge Driscoll because of a defective affidavit. Judge Driscoll did not dispose of said case (Paul Nauman R. 685). Judge Wiley subsequently disposed of said cases on definite affidavits ordered by Judge Driscoll (Plaintiff's Exhibit 10, R. 244, 685, 686).

Deputy Clerk Paul Nauman testified that none of the three defendants identified by the respondent was tried and that all pleaded guilty and that the affidavits are in the hands of the prosecutor (R. 682 to 689). He further testified and demonstrated before the jury and under the scrutiny of the trial judge, and particularly three counsel for the respondent, in reference to the original entries and photostats thereof (Plaintiff's Exhibits 8, R. 683, 9, R. 688, 10, R. 244, 685, 686) that none of the defendants was sentenced to the Workhouse and that Baranoski and Wanamaker were fined and that the matters pending as to Wainscott were passed because of a defective affidavit.

The appellate court indulges in unwarranted semantics when it assumes to try the case de novo and rationalizes, that imposition of sentence to the Workhouse, as stated in the publications complained of, meant something

different than sentence to the Workhouse as interpreted by the president and publisher, Paul Block, Jr., in his answers to Interrogatories 26, 27 and 28.

Falsity of Statements, "He Once Insisted That a Juror Swear Under Oath That His Father in Fact Had Died," That "Death in the Family, Said Judge Driscoll, Was Not Sufficient Reason to Be Excused From Jury Service," and That "Judge States Death of Member of Family No Reason Under Law to Be Excused From Jury Duty."

The references here pertain to a prospective juror, Charles Seibert. The quotes are respectively from the editorial of November 2, 1961, "For Municipal Judge," from the advertisement of November 5, 1961, "The Case of the People Against Judge Driscoll" and the advertisement of November 2, 1961, "You Be The Judge."

Predicated on the above, the editorial of November 2, 1961, "For Municipal Judge" stated, in reference to Judge Driscoll, his methods "were extreme, *brutal* and unnecessary."

The record shows that no prospective juror requested to be excused from jury service for the reason that his father died, and particularly, Mr. Seibert. Moreover, Mr. Seibert, called by the defendant, testified (R. 951) that Judge Driscoll never made the statement that death in the family was not sufficient reason to be excused from jury duty (R. 951).

Charles Seibert, the prospective juror, stated that when he first appeared for jury service on May 4, 1960, his father-in-law, not his father, was ill (Driscoll R. 375, Seibert R. 945). On that occasion a jury was not required and immediately he was excused. When he again reported for jury service on May 10, 1960, as a venireman, a jury

was sworn and again his services were not required and he was excused. On May 12, 1960, when he again reported, Judge Driscoll having learned that his father-in-law, not his father, as stated in the editorial of November 2, 1961, "For Municipal Judge," had passed away, immediately after the pending case was called for trial and before the commencement of the trial, called Mr. Seibert forward (Driscoll R. 374, Seibert R. 945 to 950), and pursuant to the statutes, Sections 2313.16 and 2313.17, Ohio Revised Code, examined him under oath as provided, and for good cause shown that his father-in-law, and not his father, had died, excused him from further jury service, in accordance with the provisions of said statutes.

As to known falsity of published statements that Judge Driscoll said death in the family is not an excuse from jury duty service, reference is made to the testimony of Mr. Seibert called by the respondent. The witness testified on cross examination (R. 951):

> "Q. He at no time told you that the death of your father was no excuse for getting off the jury, did he?
>
> A. Would you please repeat that.
>
> Q. Did he at any time tell you that the death of one's father is not a valid excuse for getting off of a jury; never said that at any time, did he?
>
> A. No. I don't believe he did, sir."

Actual Malice—Knowledge or Reckless Disregard of Falsity as Determined in New York Times Company vs. Sullivan.

Against the observation of the appellate court that there is no evidence of actual malice—knowledge of falsity or reckless disregard of whether they were false or not—in publishing the three items, unlike in *New York Times Co.*, the evidence shows numerous instances when the knowledge of the false statements of fact was brought

to the attention of the defendant, long before the publications complained of.

First Instance.

On May 12, 1960, after the news item concerning the false statement that a lady juror, Julia Brown, had been brought from her sickbed in a leather and steel harness (Defendant's Exhibit U, R. 404, 1091, 1092) the plaintiff called the city editor of The Blade, Joe Knack, at his home (R. 266 to 269), which he admitted (R. 1190, 1206), and told him the true facts of the occurrence as well as the true facts of all of the other misrepresentations which had been carried in the news items about the plaintiff (R. 267).

He told Joe Knack, the city editor (Driscoll R. 266 to 268), that he did not order the woman brought into court, but that the bailiff was instructed to contact her as to why she did not appear for jury service, that she afterward appeared and not in a leather harness as reported in the false original news item (Defendant's Exhibit U, R. 404, 1091, 1092).

He also told him the true facts concerning the other lady juror, Leila McGrath, that she had not been arrested and certainly he did not order her booked or fingerprinted, that she appeared voluntarily, that if she were booked and fingerprinted, it was contrary to his orders and after she had appeared with her attorney in response to a body attachment and not an arrest warrant (Driscoll R. 266 to 268).

He also told Joe Knack the truth of all the other incidents pertaining to the reported illegal sentences of three individuals and that his reporter, Clifford Quinn, was not truthfully reporting and was distorting the facts about him concerning such matters (R. 267). This tele-

phone conversation with Joe Knack is admitted by him (R. 1205).

Second Instance.

The day following the distorted and false representations concerning Leila McGrath, and the day following the false news items concerning Julia Brown, the bailiff who contacted Julia Brown called the city editor, Joe Knack (Graves R. 481, 482), and told Joe Knack that said Julia Brown did not come into court in a steel and leather harness but rather that she appeared in ordinary clothing and that no brace of any kind was apparent. The bailiff, Gerald G. Graves, further told him that the petitioner did not order her brought into court. On the contrary, he told him Judge Driscoll asked him to contact her for her reason for not appearing (R. 472, 478, 479).

Third Instance.

On the same morning, Friday, May 13, 1960, the day following the aforesaid news item, and later after the bailiff, Gerald G. Graves, contacted the city editor, Joe Knack, and his reporter, Clifford Quinn, the petitioner contacted Clifford Quinn, who was responsible for the false statements that Julia Brown had come into court in a steel and leather harness (Defendant's Exhibit U, R. 404, 1091, 1092), and invited him to lunch to discuss his reporting policies and to correct his apparent intentional errors. He refused to accept the petitioner's invitation to lunch unless ordered to do so by Joe Knack (Driscoll R. 303, Knack R. 1206). The city editor, Joe Knack, admitted to his refusal to permit the reporter, Clifford Quinn, to go to lunch with the petitioner and gave as his excuse that he would be required to pay him overtime for the time spent at lunch (R. 1206).

Fourth Instance.

The following Monday, May 16, 1960, The Blade published its editorial "On Becoming A Judge," referring to petitioner as "feisty" and as "having been hoisted by his own petard," both meanings admitted by dictionary definitions as "letting off wind emanating from the intestines." Webster's Third 1961 Unabridged Dictionary, defining "feisty" refers to "feist" which means "breaking wind or emission of gas from the colon." (Knack R. 1192, 1200, 1203). The same source defines "petard" as "to break wind, expulsion of intestinal gas.". The editorial of May 16, 1960 was incorporated by specific reference in the publication of November 5, 1961, which is the gravamen of the third cause of action.

Fifth Instance.

On May 19, 1960, the petitioner sent a letter to the respondent's president and its publisher, Paul Block, Jr., to again put the respondent on notice that the news items concerning the petitioner in relation to the allegations complained of in the three causes of action were false and were published to predicate defamatory editorials. The said letter is petitioner's Exhibit No. 11 (R. 272) and is as follows:

"May 19, 1960

Mr. Paul Block, Jr.
c/o The Blade
541 Superior Street
Toledo, Ohio

Dear Sir:

I have read with charity your editorial on "Becoming a Judge" and, with profound charity, the false, calumnious stories planted for editorial comment. There is some consolation in realizing many suffered more for less.

May I suggest that you review Shakespeare's "Othello," with particular attention to Iago's diabolic intrigues with his cronies until finally they incited Othello to strangle his wife, Desdemona.

Realizing my occupational hazards, and "with malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in."

Sincerely yours,
Judge William D. Driscoll

WDD: wmc

P. S. You may release the foregoing for publication if you so desire."

Sixth Instance.

When the editorial of November 2, 1961, entitled "For Municipal Judge" was published and before the publication of the advertisements complained of, the petitioners sent a registered letter to Paul Block, Jr., the president and publisher for the respondent, with return receipt requested, said receipt being petitioner's Exhibit 4 (R. 211). Said letter, petitioner's Exhibit 1 (R. 211), was delivered on November 3, 1961 and is as follows:

"November 2, 1961

Mr. Paul Block, Publisher
The Toledo Times
Toledo, Ohio

Dear Sir:

Again, with charity, I read the misrepresentation of fact in the Times editorial entitled "For Municipal Judge." The facts stated are either misrepresented or misunderstood.

Never was a prospective juror ordered or brought into court from her sickbed on a stretcher. Incidentally, the one to whom reference is made signed

my petition in support of my present candidacy to succeed myself as Municipal Court Judge. Both, the court reporter's record and the bailiff's return and the bailiff's report of the incident to your representatives, attest to the actual facts.

I have never had a prospective juror fingerprinted. In reference to the other absent juror who failed to appear for jury service pursuant to summons therefor, I issued an order for her appearance. When she appeared with her attorney she was released to him on her personal bond. The following day she served as a juror and upon completion of her service she was dismissed. If she was booked and fingerprinted, it was without my knowledge and after my order for her release on her personal bond.

I know of no instance where three Workhouse sentences were imposed contrary to law. All of the judges of the court, from time to time, have proceeded to write a sentence in the docket only to find upon announcing the sentence that there is a difference between the code citation in the affidavit and the statement of the offense. In any such instance, corrections are immediately made.

In consideration of the public's interest in such matters and our mutual public trusts and interests, I request that you make a retraction of the misrepresentations and publish the corrections before greater misunderstandings occur.

Very truly yours,

William D. Driscoll, Judge"

Seventh Instance.

Thereafter, and before the advertisement complained of, petitioner paid for a political advertisement (Defendant's Exhibit N, R. 385, 395), setting forth therein the contents of the letter to Paul Block, Jr., on November 2, 1961. The advertisement was published in the same issue

of the Sunday Blade on November 5, 1961 with the two conflicting advertisements which are the gravamen of the second and third causes of action, respectively.

Eighth Instance.

Prosecutor Gordon Holder testified (R. 160 to 165) that he approached police reporter Clifford Quinn in the prosecutor's office, that he was referred to a transcript of proceedings before Judge Driscoll (R. 161). He read it and turned to Clifford Quinn and said, "I find nothing wrong or objectionable with what the judge said." (R. 161). Clifford Quinn said, "There is the paragraph that is going to hang him." (R. 162). Holder said, "What are you referring to?" Quinn replied, "No man can live up to these statements." (R. 162). Holder said, "You mean to say that you are going to lay in wait for that man to go contrary to his own word, and crucify him?" (R. 162). Quinn angrily replied, "You want some of the same treatment?" (R. 163). Quinn said, "There is something strange going on between you and Driscoll." (R. 163). Holder said, "I want you to explain that remark." (R. 163). Thereupon Quinn referred to Holder's recommending an appearance bond in the amount of $5,000.00 for a defendant charged with burglary (R. 163).

Ninth Instance.

In the instant case, as distinguished from *New York Times Company v. Sullivan*, the information in its editorial was gathered by editor, Charles Gilmore, and author of the editorial, the subject of the first cause of action, from the respondent's file. Charles Gilmore testified as follows (R. 1081):

"Q. All right. Now on November 2, 1961 do you recall writing an editorial that was headed "For Municipal Judge"?

A. Yes, sir.

Q. That was published in The Toledo Times on that date?

A. Yes, sir. Well, that would have been written the day before, sir. If the publication is the 2nd, that was written the 1st.

Q. Now will you tell us what process you followed in the gathering of the material for that editorial.

A. I relied for the factual statements in it, I relied on news clippings that had been filed in the library of The Toledo Blade, news clippings taken from The Toledo Times and The Toledo Blade. I went back to the library, pulled the folder on Judge Driscoll, went through the clippings, took notes on them, returned to my office and wrote the editorial from the notes taken from those news clippings."

Tenth Instance.

Fred Jarvie, manager of political advertising, testified (R. 1070) that he sent the petitioner's advertisement and the advertisements referred to in the second and third causes of action, *which were conflicting,* to the news department and the editorial room for checking for accuracy before authorizing their publication (R. 1071). He testified (R. 1070):

"Q. Now you were Retail Advertising Manager, then, in 1960 and '61, were you?

A. Yes.

Q. And as Retail Advertising Manager at that time, you did pass upon the advertising?

A. Yes.

Q. I will hand you what has been identified as Defendant Blade Exhibit N, ask you to look at the article down at the bottom headed, "Judge William D. Driscoll Answers the Press." Did that ad come to you for approval?

A. Without a doubt. However be impossible to remember all the ads submitted.

Q. And what would be the procedure so far as you were concerned, after you got the ad to approve; would you have anything to do outside of just looking at it?

A. Well, I would take any political advertisement that contains reprint or quotes or excerpts from a news story or editorial, they would be submitted to our news or editorial department so they might check the contents of the ad.

Mr. Belli: Did you say would be submitted?
The Witness: Would be submitted, yes.

Q. (By Mr. Bunge) And in connection with that ad on Blade Exhibit N, did you approve the publication of that ad?

A. Without a doubt I did. However, it is difficult to remember any individual ad."

He adopted the same procedure with respect to the political advertisements offered to him for publication and which are the gravamen of the second and third causes of the second amended petition (R. 1070, 1071). This was particularly true with respect to the advertisement which is alleged in the third cause of action entitled, "You Be The Judge," published in The Blade of Sunday, November 5, 1961, wherein the said advertisement referred to and incorporated the editorial "On Becoming A Judge" appearing in The Blade on Monday, May 16, 1960 (Plaintiff's Exhibit 12). In said editorial the Toledo Blade Company used the words "feisty" and "petard" as to the plaintiff and represented as to "feisty" that the plaintiff was subject to "breaking wind or emission of gas from the colon." The word "petard" has the same meaning, "to break wind, expulsion of intestinal gas."

Eleventh Instance.

On the issue of actual malice, as construed in *New York Times Company v. Sullivan*, it is significant that Paul Block, Jr., the publisher and president of the defendant, The Toledo Blade Company, testified (R. 579):

> "A. * * * The Toledo Times apparently was trying to defeat Judge Driscoll for office.
> Q. And using this means of doing it, right?
> A. Among many others."

The publisher testified that, after having been informed that the false statements of fact reprinted in the articles complained of were false and were published with intentional defamation, and that the statements should be corrected, said statements were not corrected because (R. 586), as he said, to do so would be unfair to the publisher thereof and to the petitioner; and besides Judge Driscoll might some time again stand for public office (R. 595).

Twelfth Instance.

The respondent's motive was revealed as early as September 20, 1960 when respondent stated in its tongue-in-cheek editorial entitled "Judge Driscoll's Fine Points" that "* * * he (Judge Driscoll) has taken on * * * even the Blade's police reporter." (Defendant's Exhibit M, R. 357, 395). The only evidence in support of said statement is that Judge Driscoll complained to the city editor, Joe Knack, and the publisher, Paul Block, Jr., about the practices of the said police reporter, Clifford Quinn, and about the defamatory, false statements theretofore published by the respondent concerning the petitioner.

The Trial Judge Charged the Jury on the Substantive Law as Stated in New York Times Company v. Sullivan (1964), 376 U. S. 254.

The trial judge charged the jury in the general charge (R. 1467 to 1474) that to recover petitioner must prove by the preponderance of the evidence that one or more of the publications complained of considered in its entirety was false, defamatory and was published with actual malice, that is, with actual knowledge that it was false or with reckless disregard of whether it was false or not.

The trial judge also charged, at the instance of the respondent, Special Request No. 4 (R. 1319):

> "The Court instructs you that where an article is published and circulated among voters for the sole purpose of giving what the person publishing and circulating such article believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without actual malice, the article is privileged, although the principal matters contained in such article may be untrue in fact and derogatory to the character of the plaintiff; and, in such case, the burden is on plaintiff to show that the person or persons in the defendant's organization who published said article for said defendant did so at the time of the publication with actual malice toward plaintiff, that is, with knowledge that it was false or with reckless disregard whether it was false or not."

The trial judge also charged, at the instance of the respondent, Special Request No. 5 (R. 1320):

> "The Court instructs you that the guarantees of the First and Fourteenth Amendments to the Constitution of the United States prohibit plaintiff, William D. Driscoll, from recovering any damages from the

defendant, Toledo Blade Company, for any statement concerning his official conduct unless he proves: (1) that the statement was defamatory; (2) that the statement was false; and (3) that the person or persons in the defendant's organization who published said statement made the statement with actual malice towards the plaintiff, William D. Driscoll, that is, with knowledge that the statement was false or with reckless disregard of whether it was false or not."

The trial judge also charged, at the instance of the respondent, Special Request No. 10 (R. 1322):

"The Court instructs you that at the time the defendant published the statements upon which this action is founded, the plaintiff was a Judge of the Toledo Municipal Court and a candidate for election to that office. As a public officer and a candidate for public office, plaintiff put his character of fitness, abilities and qualifications for the office in issue. His conduct and his acts could be freely commented on and boldly censured, and statements made in good faith of him as a public officer and candidate for public office, when made by one who had a reasonable ground to believe them true, and did so believe them to be true, are privileged, and no recovery can be had by plaintiff against the defendant unless the proof shows said statements to be false and defamatory and shows they were made by the person or persons who published them for the defendant, Toledo Blade Company, with actual malice, that is, with knowledge of their falsity or with reckless disregard whether they were true or false."

The trial judge also charged, at the instance of the respondent, Special Request No. 13 (R. 1323):

"The Court instructs you that the burden is upon plaintiff to prove that the person or persons in the defendant, Toledo Blade Company, organization who published any matter upon which this action is based,

published the same with actual malice toward the plaintiff, William D. Driscoll; that is, with knowledge that the statement was false or with reckless disregard of whether it was false or not. This kind of malice must be proved by competent evidence as any other fact. The law does not presume it and the jury cannot infer it without sufficient evidence to warrant such an inference. Therefore, unless after considering all of the evidence you find that the person or persons who acted for the defendant, Toledo Blade Company, in the publication of said matter were motivated by actual malice toward the plaintiff, William D. Driscoll, at the time of publication thereof, you must bring in a verdict for the defendant, Toledo Blade Company."

HOW FEDERAL QUESTIONS PRESENTED.

The questions here involved were first put in issue in the perfection of the pleadings, during the trial and in conference with the trial judge in reference to Special Instructions (R. 1264 to 1317) and on respondent's motions for judgment notwithstanding the verdict and for a new trial, in respondent's assignment of errors in the Court of Appeals, in the opinion and judgment of the Court of Appeals reversing the verdict and judgment for petitioner and granting final judgment for the respondent, in petitioner's motion in the Supreme Court of Ohio, the court of last resort in the State of Ohio, on the grounds that the appeal to said court involved constitutional issues and questions of general and public interest, and in petitioner's motion in the Supreme Court of Ohio for reconsideration of said court's denial of review.

The first material prejudicial errors pertinent to petitioner's constitutional and legal rights arose and abide in the judgment of the Court of Appeals (Appendix, pp. 64-66).

REASONS WHY THIS WRIT SHOULD BE GRANTED.

First Specification.

In the instant case the courts of last resort in Ohio have engrafted on the *New York Times* case the unwarranted and prejudicially erroneous rule of law, on authority purportedly of the *New York Times* case, that in a libel action by a public official the proof required is beyond the preponderance of the evidence. The *New York Times* case does not support the statement of law in the third paragraph of the syllabus of the opinion in the instant case (Appendix, p. 39), to wit:

> "3. The burden of showing actual malice is on the plaintiff where the proof must be sufficiently clear (beyond the preponderance of the evidence) to show that the judgment does not constitute a forbidden intrusion in the field of free expression. (New York Times Co. v. Sullivan, 376 U. S. 254.)".

The foregoing statement of law invokes the application of Subsection (a), Rule 19, of Rules of the Supreme Court of the United States, providing allowance of a petition for a writ of certiorari, "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Historically and consistently the law of Ohio has been and is that the degree of proof in a libel case is by the preponderance of the evidence. The trial court, in *Westropp v. E. W. Scripps Company,* 148 Ohio St. 365, so charged in Special Instruction No. 9, and the Supreme Court of Ohio found no error on that issue upon review.

In *Mauk v. Brundage,* 68 Ohio St. 89, cited by the Court of Appeals in the fourth paragraph of the syllabus in the instant case (Appendix, pp. 39-40), the Supreme

Court of Ohio, at page 99, stated the degree of proof in libel is the preponderance of the evidence and so held, as stated in paragraph three of the syllabus.

The cases cited and annotated support the preponderance rule as stated in 34 *Ohio Jur.* 2d, page 308, par. 146 and 21 *Ohio Jur.* 2d, page 721, par. 694.

As late as March 2, 1966, while the instant case was pending on application for review by the Supreme Court of Ohio, said court held in *Household Finance Corporation v. Altenberg,* 5 Ohio St. 2d, 190, that in all civil cases at law issues of fact shall be determined by the preponderance of the evidence. This decision was called to the attention of the Supreme Court of Ohio in petitioner's application for rehearing. The Supreme Court of Ohio stated, at page 192, in *Household Finance Corporation, supra,*

> " 'there is no doctrine of the law settled more firmly than the rule which authorizes issues of fact in civil cases to be determined in accordance with the preponderance or weight of the evidence.' Jones Stranathan & Co. v. Graves, 26 Ohio St. 2, 4. See, also, Rice v. City of Cleveland, 144 Ohio St. 299."

At page 193, the court further stated,

> "In addition, persuasive practical considerations intervene to prevent this court from expanding the clear and convincing rule to cases not equitable in nature."

Second Specification.

The judgment of the appellate court vacating and reversing the verdict and judgment of the trial court for the petitioner and granting final judgment for the respondent is unconstitutional, in that it invades the provisions of Article I, Section 5, of the Ohio Constitution and the clauses pertaining to protection of property rights and

due process contained in the Fourteenth Amendment to the United States Constitution. The Ohio Constitution, Article I, Section 5 provides:

> "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

The law of Ohio is that it is error for the trial court or the court of appeals to reverse a jury verdict where there is substantial evidence to support it. *Gibbs v. Village of Girard* (1913), 88 Ohio St. 34; *Hamden Lodge #517, Independent Order of Odd Fellows v. Ohio Fuel Gas Company* (1934), 127 Ohio St. 469; *Candela v. New York Central System* (1960), 171 Ohio St. 373; *In re Adoption of Cassada* (1960), 171 Ohio St. 368; *Miller v. Industrial Commission* (1953), 158 Ohio St. 551; *Wilkeson v. Erskine & Son, Inc.* (1945), 145 Ohio St. 218; *Krueger v. Schoenling Brewing Company* (1948), 82 O. App. 57; *Kenny v. Metropolitan Life Insurance Co.* (1948), 82 O. App. 51; *Ayers v. Woodard* (1957), 166 Ohio St. 138; *Botto v. Fischesser* (1963), 174 Ohio St. 322.

In 3 *Ohio Jurisprudence* 2d 807, par. 818, it is stated:

> "The weight to be given to the conclusions of the triers of the facts and of the trial court passing upon motion for a new trial is coupled with the usual presumption which must be indulged in favor of the correctness of the judgment and proceedings under review, and, in determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts; if the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment,

most favorable to sustaining the verdict and judgment."

Third Specification.

This Court should again lift the veil of the Seventh Amendment to give effect in this instance to the prohibitions of the Fourteenth Amendment protecting the property rights of the petitioner and guaranteeing him due process of law.

The record in this case reveals the other side of the coin in *New York Times* and warrants the application of the principles stated in *New York Times* and succeeding libel cases decided by this Court.

Mr. Justice Brennan speaking for this Court in *New York Times Co. v. Sullivan,* 376 U. S. 254, at page 269, stated:

> "Like 'insurrection,' contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."

It is stated in *Garrison v. Louisiana,* 379 U. S. 64, at page 75,

> "For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interests in order and morality * * *.' * * * Hence the knowingly false statement and the

false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

Petitioner submits that this Court should adopt and give life to the thesis expressed by Mr. Justice Stewart in his concurring opinion in *Rosenblatt v. Baer*, 383 U. S. 75, at page 86.

Mr. Justice Stewart, concurring in *Rosenblatt*, stated:

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

"We use misleading euphemisms when we speak of the New York Times rule as involving 'uninhibited, robust, and wide-open' debate, or 'vehement, caustic, and sometimes unpleasantly sharp' criticism. What the New York Times rule ultimately protects is defamatory falsehood. No matter how gross the untruth, the New York Times rule deprives a defamed public official of any hope for legal redress without proof that the lie was a knowing one, or uttered 'in reckless disregard of the truth.'

"That rule should not be applied except where a State's law of defamation has been unconstitutionally converted into a law of seditious libel. The First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars. The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the

only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

"Moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society."

Fourth Specification.

The final judgment in this case is a defiance of this Court in *New York Times Co. v. Sullivan* and *Garrison v. Louisiana.*

CONCLUSION.

The First Amendment guaranteeing freedom of the press should not be further construed as a prerogative extended to malicious liars. It requires no documentation that the First Amendment was effected by our God-fearing forbears in their search for Truth through a truthful presentation of fact. Their abiding and profound search for Truth and the adoption of the constitutional guarantee of freedom of religion in said First Amendment is evidence that the guarantee of the freedom of the press was not then a guarantee of a permission extended to liars in contravention of the moral law and the prohibitions of Divine Providence. It requires no citations of legal precedents to support historical facts that the first doctrines of common law were interpretations of the moral law compiled in the first statutes codified by Divine Providence in the Ten Commandments. The eighth of the ten provides, "Thou shall not bear false witness against thy neighbor." From Adam and Eve to the present time, humanity has witnessed the decay of society, institutions and civiliza-

tions as a consequence of flouting the moral law and this divine statute. Based on historical precedents in an age of nuclear destruction, it is horrible to contemplate the results of a society weaned on the principles of sanctioned deceit and lies in the face of Infinite Power.

In the instant case, the appellate court approves malicious lies and grants to the malicious liar the permission to publish them in contravention of the moral law, the Fourteenth Amendment, guaranteeing the protection of property rights, and the decisions of this Court in *New York Times Company* and *Garrison*. The opinion and judgment of the appellate court shock the universal sense of justice and negate and are repugnant to rational morality.

Unless the Fourteenth Amendment has no effect in its relation to the First Amendment, or unless a political officer has no property right in his reputation, or unless the intentional liar is sponsored to publish knowingly defamatory falsehoods concerning public officials and thereby to deceive society to frustration and chaos, petitioner submits this petition for writ of certiorari should be allowed to the end that the record will be reviewed in its true light rather than the distorted opinion of the court of appeals. The insidious decision in this case should not be allowed as a precedent in interpreting *New York Times v. Sullivan*.

Petitioner respectfully suggests that this Court reverse the judgment of the Court of Appeals for Lucas County, Ohio, and affirm the judgment of the trial court, the Court of Common Pleas, Lucas County, Ohio.

Respectfully submitted,

MELVIN M. BELLI,

and

WILLIAM D. DRISCOLL,

Attorneys for Petitioner.

APPENDIX.

OPINION OF THE COURT OF APPEALS OF LUCAS COUNTY.

Libel—Newspaper—Public official seeking election—Publication concerning conduct in office—Malice and knowledge of falsity necessary—Truth of facts complete defense—Burden of showing malice—Sufficiency of evidence—Questions for court—Whether publication libelous per se or privileged.

1. In an action against a newspaper publisher seeking damages for libel, where the plaintiff is a public official then seeking election and the subject matter of the publications is concerned with his conduct in office, such action cannot be maintained unless the articles were published with actual malice, that is, with knowledge of their falsity or with a reckless disregard of whether or not the facts upon which the publication was based were true or false. (First Amendment to the Constitution of the United States. *New York Times Co. v. Sullivan,* 376 U. S. 254.)

2. In such action the defendant may show the truth of the facts published and, if thus shown by the weight of the evidence, the truth is a complete defense. Section 2739.02, Revised Code.

3. The burden of showing actual malice is on the plaintiff where the proof must be sufficiently clear (beyond the preponderance of the evidence) to show that the judgment does not constitute a forbidden intrusion in the field of free expression. (*New York Times Co. v. Sullivan,* 376 U. S. 254.)

4. In an action for libel, the question whether the publication is or is not libelous per se is a question for the court. And where the publication is claimed to be privileged, the question of whether or not the occasion gives

privilege, the controlling facts being conceded, is also for the court. (*Mauk v. Brundage*, 68 Ohio St. 89.)

(No. 5919—Decided September 29, 1965.)

APPEAL: Court of Appeals for Lucas County.

Mr. Melvin M. Belli and *Mr. William D. Driscoll*, for appellee.

Mr. Dan H. McCullough and *Messrs. Marshall, Melhorn, Bloch & Belt*, for appellant.

SKEEL, J. This appeal comes to this Court on questions of law from a judgment entered for the plaintiff on the verdict of a jury in the Court of Common Pleas of Lucas County. The plaintiff, during the time encompassed in his petition, was a Judge of the Municipal Court of the City of Toledo, Ohio, and was then a candidate for election to succeed himself, he having been appointed to fill an unexpired term. The defendant, Toledo Blade Co., an Ohio corporation, was the publisher of two newspapers of general circulation in Toledo and extending beyond the city, it being alleged that it has some international circulation. The defendant, Paul Block, Jr., is President of the Toledo Blade Co. The claims against Paul Block, Jr., will be omitted for the reason that upon motion at the end of plaintiff's case he was dismissed from the action. The action is one seeking damages for alleged libels published in the newspapers of the defendant, Toledo Blade Co.

The plaintiff's second amended petition presents three causes of action, each cause of action being based on a separate article or designated advertisement concerning the plaintiff with respect to his conduct as a Municipal Judge. The first cause of action recites the substance of an editorial in the Toledo Times, one of the newspapers published by Toledo Blade Co., dated November 2, 1961, which, after reciting that the Municipal Court of Toledo is

the court where most Toledoans get their impression of "American Jurisprudence" and for that reason "* * * Municipal Court judges above all must possess qualities of tolerance and humane understanding as well as a technical knowledge of the law," further states:

> "No one can question Judge William D. Driscoll's fine technical knowledge of the law. He has a deep passion for constitutional rights and a fierce zeal for defending them. But unfortunately his regard for the majesty of the law does not appear to have anything to do with human beings.
>
> "It is difficult to imagine how anyone could stir up so much needless unpleasantness in less than two years than Judge Driscoll has since his appointment to the bench. Over a flimsy technicality he tried to set aside a practice of seven years standing by which some 1,200 to 1,500 Toledoans a month conveniently could pay off minor traffic fines without going to court. On three occasions he imposed Workhouse sentences when none were provided by law. Once he had arrested, booked and fingerprinted a prospective woman juror who, through a misunderstanding, failed to show up for duty—only to excuse her in the end. Another woman juror was ordered brought to the courtroom from her sickbed, on a stretcher. He once insisted that a juror swear under oath that his father, in fact, had just died. And there was that remarkable period during which Judge Driscoll erroneously concluded that the city ordinance covering drunk driving penalties was unconstitutional, and refused to pass on 45 cases until the Supreme Court overruled him.
>
> "In all of this Judge Driscoll's legal motives were of the highest. But his methods of executing them were extreme, brutal and unnecessary. For that reason, the Times recommends that Robert R. Foster be elected to the Municipal Court bench in his place."

This cause of action charges that defendant "intentionally, deliberately, maliciously and with the purpose of defaming the plaintiff published misleading and false statements concerning the plaintiff," referring to the substance of the foregoing editorial. The balance of the allegations of the first cause of action, the plaintiff improperly pleads evidence to explain and justify his conduct with respect to the matters upon which the editorial was based.

The second cause of action is based on a political advertisement dated November 5, 1961, appearing in the Toledo Blade of that date, headed: "The Case of the People Against Judge Driscoll." This advertisement, in part, stated:

> "Justice may well have blushed behind her blindfold when Judge William Driscoll mounted the municipal bench.
>
> "For rarely has a man so quickly demonstrated a lack of judicial temperament.
>
> "As The Blade put it in an editorial: 'Right from the start, he pushed aside any pretense of letting compassion or good judgment color his approach to meting out justice, as he sees it. Ignoring helpful suggestions by veteran court officers, to whom he occasionally delivered an impromptu tongue lashing, Judge Driscoll found himself hoisted by his own petard three times within a month. And in each case, where he had stubbornly proceeded to hand down Workhouse sentences where none was called for by law, he had to back down and vacate them.
>
> "COMPLETE UNREASONABLENESS
>
> " 'And last week, he provided two more demonstrations of his complete unreasonableness in his treatment of two prospective women jurors. In one instance, he ordered police to haul one woman into

court like a common criminal, only to excuse her from jury duty after she reminded him—as he well knew—that she was leaving on vacation. Three days later, in an even more flagrant example of his mulishness, the judge ordered a woman taken from her bed where she had been confined in traction since an auto accident, helped into his august presence in the courtroom, whereupon he finally released her from jury duty.'

"The cases mentioned by The Blade were not the only examples of his high-handed handling of citizens called as jurors. In another case, he insisted that a man take an oath that his father-in-law had passed away the previous day before he would excuse him from jury duty. Death in the family, said Judge Driscoll, was not sufficient reason to be excused from jury duty.

"WHO'S OUT OF STEP?

"And, like the Army rookie who insisted everybody else was out of step, Judge Driscoll decided the city ordinance covering drunk driving cases was unconstitutional. It made no difference to him that his four fellow judges did not agree. While they disposed of cases as in the past, he dismissed some and deferred others. When the State Supreme Court finally set him right nearly a year later, there were 45 of his cases to be cleared up."

The petition then states that the statements, and particularly the quotations therein, "are slanted, distorted, over emphasized, misleading, false and defamatory." It is stated that defendant knew that such statements were untrue and published in a spirit of cool, calculated malice with intent to grievously harm the plaintiff and to promote their mercenary interests and by such editorial to show that plaintiff was grossly unfit for judicial office and intending to bring plaintiff into hatred, contempt, ridicule

and scorn of the general public, impairing his reputation as a lawyer and judge, causing him embarrassment, humiliation and distress of mind, and causing him loss of income.

The third cause of action is based on an advertisement published in the Toledo Blade, Sunday, November 5, 1961. (The election in which the plaintiff was a candidate for election was to be held Tuesday, November 7, 1961.) This cause of action recited that the advertisement was headed: "YOU BE THE JUDGE," and alleges that it was published for the purpose of defaming the plaintiff, and that the statements therein were slanted, distorted, over emphasized, misleading, false and defamatory. The plaintiff restated the claims set forth in his second cause of action as to the effect of such statements on his reputation as a lawyer and judge and the mercenary purpose of the defendant in printing such fictitious scandal and "calumny" regarding a person in a public position of honor and trust.

The advertisement headed "YOU BE THE JUDGE" was published by the "Republican Campaign Committee" in the interests of a candidate opposing the plaintiff for the term for which he was a candidate. In part, it stated:

"THE CASE

"Judge Imposes Jail Sentences Contrary to Law.

"Judge states death of member of family no reason under law to be excused from jury duty.

"Judge throws traffic court into confusion.

"Seven drunken driving cases dismissed by Judge in running battle with city law department.

"Judge hassles with veteran court officials.

"Judge orders police to haul prospective woman juror into court like common criminal.

"These statements were taken from The Blade's editorial pages and news stories from the period from May 11, 1960, to September 20, 1960, and they accurately reflect some of the arbitrary actions taken by Judge William Driscoll since he was appointed to the bench in January of 1960 by Governor Disalle.

"He has imposed workhouse sentences on three occasions where none was called for by law. He required a sick juror, an excused juror and a juror with a death in his family to appear before him in open court. He has tried to undo a practical method for handling traffic cases expeditiously, and thrown traffic court into utter confusion.

"These actions have caused the Blade, in an editorial of May 16, 1960, to call him 'temperamental' and to state that 'when justice is dispensed with a hot tongue and cold disregard for human relations, it can easily become injustice.' "

The defendant-appellant claims the following errors:

"1. The verdict and judgment deprive this appellant of its constitutional right to freedom of speech and freedom of the press guaranteed by the First and Fourteenth Amendments of the Constitution of the United States and Section 11 of Article I of the Constitution of Ohio.

"2. The verdict and judgment are contrary to law and the evidence.

"3. The trial court erred in refusing to grant the motion of appellant for judgment in its favor at the conclusion of all the evidence.

"4. The trial court erred in overruling appellant's motion for judgment notwithstanding the verdict.

"5. The trial court erred in overruling appellant's motion for a new trial.

"6. The amount of the verdict is excessive.

"7. The jury, under the influence of passion and prejudice, awarded excessive damages.

"8. The trial court erred in refusing to withdraw a juror and declare a mistrial.

"9. The trial court erred in the admission of improper evidence offered by appellee.

"10. The trial court erred in the rejection of proper evidence offered by appellant.

"11. Appellant was denied the fair and impartial trial guaranteed by the Fourteenth Amendment of the United States Constitution and Section 16 of Article I of the Ohio Constitution.

"12. The trial court erred in giving to the jury, before argument, special instructions requested by the appellee.

"13. The trial court erred in refusing to give to the jury, before argument, special instructions requested by appellant.

"14. The trial court erred in its general instructions to the jury.

"15. The verdict and judgment are not sustained by sufficient evidence and are against the manifest weight of the evidence.

"16. Other errors of law manifest upon the face of the record."

The first five assignments of error concern the question of the limits of the constitutional protection of the press to comment on the conduct of a public official in the discharge of his official duties. Section 11, Article I of the Constitution of Ohio provides:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth

may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

Section 2739.01, Revised Code, defines the necessary allegations in a petition for libel. Section 2739.02, Revised Code, provides that in such an action the defendant may allege and prove the truth of the matter charged as defamatory. The proof of the truth thereof shall be a complete defense. By the provisions of Sections 2739.13 to 2739.15, Revised Code, dealing with the correction of false or misstatement of facts published of one making a demand for a correction, one who makes a demand for a published correction must furnish the publisher with what he claims to be a true statement of the matter in controversy, which must be presented to the publisher under oath.

With the foregoing background of the Ohio Constitution and the statutes dealing with libel, we are presented by the foregoing assignments of error with the question of the constitutional right (Amendments I and XIV, United States Constitution) of the press to comment upon the conduct of the plaintiff in the performance of his public duties and while seeking election to succeed himself to the office to which he was appointed.

The office of Municipal Judge is one of basic importance in the judicial system of Ohio. Fitness of one holding the office of judge of such court or a candidate for election as judge to discharge the duties of such office are matters of public concern and should be open to legitimate public debate to the benefit of and for the public good. Acts and words of a judge committed and stated or announced in the performance of his duties are the subject of fair criticism and report by the public press. Sections 2317.04 and 2317.05, Revised Code, do not deal directly with re-

porting occurrences in the actual conduct of a trial or proceedings in a trial court, yet the substance of these sections points the way in support of the rule that is now well founded upon case law that a fair report of proceedings in the trial of and the results obtained upon trial in a court may be fairly reported and, when so reported with reasonable accuracy, the report, if publicly made, is privileged. Judicial proceedings are indeed public affairs of the highest order. To safeguard the constitutional rights of the litigants, trials must be held in public (with certain exceptions to protect the public morals) so that a report of what is said or done in open court is then public information, which clearly includes the conduct in act and word of the presiding judge. Everyone in the courtroom attending this case, as reported by the defendant (except for the citations issued for jurors) heard everything that was thereafter the subject of the articles and now complained of as reported in the public press. It is in part, at least, as a result of such reports that the public learns of the basis upon which to consider the question of the qualification of plaintiff and other candidates seeking election to public office.

The state statutes and Constitution, *supra*, and the proceedings in state courts, must be interpreted in the light of the First and Fourteenth Amendments of the United States Constitution and the interpretation of these articles as declared by the Supreme Court of the United States. In the case of *New York Times Co. v. Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A. L. R. 2d 1412, Sullivan, an elected official of Montgomery, Alabama, recovered a judgment against the "Times" for libel based on the fact that the newspaper had published a paid advertisement in which some of the statements contained therein were claimed by respondent to refer to him

charging misconduct in the performance of the duties of his office and that such charges were false and untrue and libelous per se. In the syllabus, the Supreme Court concluded:

> "*Held*: A state cannot under the First and Fourteenth Amendments award damages to a public official for defamatory falsehood relating to his official conduct unless he proves 'actual malice'—that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false."

The court said on page 256:

> "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."

The court proceeded to say that this case must be considered against "the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," and "That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive.' "

The court quoted Judge Edgerton, speaking for a unanimous court, in *Sweeney v. Patterson*, 76 U. S. App. D. C. 23, 24, as follows:

> " 'Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. * * * The interest of the public

here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. * * * Whatever is added to the field of libel is taken from the field of free debate.' "

The United States Supreme Court then said:

"Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. *Bridges v. California,* 314 U. S. 252. This is true even though the utterance contains 'half-truths' and 'misinformation.' *Pennekamp v. Florida,* 328 U. S. 331, 342, 343, n. 5, 345. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also *Craig v. Harney,* 331 U. S. 367; *Wood v. Georgia,* 370 U. S. 375. If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' *Craig v. Harney, supra,* 331 U. S., at 367, surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations."

In reversing the judgment for the respondent primarily for the reason that "the proof presented to show actual malice lacks the convincing clarity which the constitutional standards demands, and hence that it would not constitutionally sustain the judgment for respondent un-

der the proper rule of law," the court cited the case of *Coleman v. MacLennan*, 78 Kans. 711, 98 P. 281. In that case the state Attorney General, a candidate for re-election and a member of the commission charged with the management and control of the state school fund, sued a newspaper publisher for alleged libel in an article purporting to state facts relating to his official conduct in connection with a school fund transaction. The defendant pleaded privilege and the trial judge, overruling plaintiff's objection, instructed the jury that:

> "Where an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and in such a case the burden is on the plaintiff to show actual malice in the publication of the article."

The court then quotes the Kansas Supreme Court (78 Kans. at 724) in its affirmance of the judgment for the defendant, as follows:

> "'It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussion is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great,

and the chance of injury to private character so small, that such discussion must be privileged.' "

In the case of *Garrison v. Louisiana*, — U. S. —, 13 L. Ed. 2d 125, 85 S. Ct. 209, the defendant was convicted of criminal defamation. He, as District Attorney, during a dispute with the Judges of Criminal District Court of the Parish of New Orleans in holding a press conference, issued a statement to the effect that the large backlog of pending criminal cases was attributed to the inefficiency, laziness and excessive vacations of the Judges and charged them with refusing to authorize disbursements for undercover investigations of vice in New Orleans. According to the opinion, he stated:

"The judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investigation by refusing to authorize use of the DA's funds to pay for the cost of closing down the Canal Street clip joints. * * *

"* * *

"This raises interesting questions about the racketeer influences on our eight vacation-minded judges."

The Supreme Court reversed the judgment of the state court.

The sixth and eighth paragraphs of the S. Ct. Reporter headnotes provide as follows:

"6. Even where the utterance is false, the great principles of Constitution which secure freedom of expression in area of criticism of official conduct of public official preclude attaching adverse consequences to any except the knowing or reckless falsehood; debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed con-

tribute to the free interchange of ideas and the ascertainment of truth."

"8. Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned; only those false statements made with high degree of awareness of their probable falsity may be the subject of either civil or criminal sanctions."

From the foregoing case law, the following conclusions are apparent:

1. Libel is "that which is written or printed and published calculated to injure the character or reputation of another by bringing him into ridicule, hatred or contempt." *Black's Law Dictionary.*

2. The person charged with libel by another can have complete exoneration by proving the truth of the matters charged as defamatory. Section 2739.02, Revised Code.

3. Statements by public officials, including judicial officers, as a necessary part of their official duties, including material statements of parties to a judicial proceeding, are privileged. *Liles v. Gaster,* 42 Ohio St. 631, *Erie County Ins. Co. v. Crecelius,* 122 Ohio St. 210, *Bigelow v. Brumley,* 138 Ohio St. 574.

4. Criticism of public officials and their conduct in office is privileged under the First Amendment to the Constitution of the United States unless such publication was made with actual malice, that is, with knowledge that the published matter was false or was published with a reckless disregard of whether it was false or not.

It remains to be determined by an examination of the evidence whether the plaintiff has, in fact, made out a prima facie case against the defendant under the rules of law as just stated.

The statement in the editorial of Thursday, November 2, 1961, concerning the importance of the Municipal Court in the administration of justice in this state cannot be too strongly stressed. Even though its jurisdiction is limited and in the field of criminal law confined to the trial of misdemeanors and ordinance violations, yet more people are directly affected by the cases tried in that court than in any other court in the judicial system of Ohio. There is no such thing as an unimportant case where the legal rights of the people are the subject of judicial inquiry and where a party in many cases must represent or defend himself for reasons much too evident to require explanation. The judge has the burden of seeking the truth and seeing that justice is done in a great many cases with reasonable dispatch, particularly in traffic matters, without the assistance of contending lawyers.

The Municipal Court of the city of Toledo, recognizing that in disposing of traffic citations because of the great number of violations ticketed by police of what might be called "minor cases" where the imposition of sanctions would probably be small, and for that reason uniform, passed by resolution of the judges a rule (similar rules are followed in all large cities in Ohio) permitting one who has received a "ticket" to pay the fine for the stated violation as fixed by the resolution. The method by which the rule was to be carried out was to require the arresting officer to file an affidavit charging the violation on his return to the Safety Building from his tour of duty and to require the defendant, if he desired not to attend court but rather to plead guilty to the charge, to sign the following "Appearance, Plea and Waiver" which was as follows:

> "I, the undersigned, do hereby enter my appearance in the Municipal Court of Toledo, Ohio, on the complaint for the offense charged on the reverse side

of this notice, and having been informed of my right to a trial and the meaning of the Plea of Guilty and Waiver of Trial, do hereby PLEAD GUILTY to said offense as charge, waive my right to a trial by jury, and a hearing before said court, and agree to pay penalty prescribed by Statute, Ordinance or Court Order."

Judge Driscoll, according to his own testimony, at first refused to sign the docket on which these cases and the fines collected were listed for entry of judgment, thus putting into confusion a practice that had been followed by all the judges since April 21, 1952. The plaintiff testified, in explaining his view of the third item of the advertisement set out in the third count:

"Judge throws Traffic court into Confusion."

"Q. Why wouldn't you sign the docket on cases you didn't know anything about? A. Because frankly I didn't want to be put in an embarrassing position, which I knew could have been done to me so easily and I was frightened and I wasn't going to be put in a position that anybody would believe what I would say about a situation that might very well develop.

"* * *

"Q. I want you to just take a little time here and tell the ladies and gentlemen of this jury about this practice of the Judges signing cases that they knew nothing about.

"* * *

"A. Well, some years ago, I think it was in April of 1952, the judges of the court at that time and various officials, the police, I believe, and I believe the Law Director and possibly some others were a party to a letter or an agreement, a compromise so to speak, and as a consequence of that compromise, the court, the judges, or at least a majority of them, if not all of

them, instructed the clerk to take payouts in certain rather ordinary traffic—

"Q. Better explain that word payout, what is that? A. That's what it was known by. By that, these various cases in these various instances one who was cited might take his citation to the clerk, there an affidavit would be on file, he would enter his appearance as before the court, enter a plea of not guilty as before the court and he would accept the sentence which the clerk would pronounce, pursuant to that letter.

"Q. You mean the clerk would pronounce sentence then he would plead not guilty? A. It was a chart so to speak for various moving violations.

"Q. What I am interested in—could they plead not guilty before the clerk? A. That was my question, that's one of the questions. At least that's the way it was handled. And then the following morning these cases would appear on the docket.

"Q. You mean the clerk would give them a sentence? A. After he would collect the fine. It was just a fine, was a penalty, wasn't a jail sentence.

"Q. And those cases that the clerk had imposed a fine pursuant to his judicial function, they would then appear on a judge's docket the next day? A. That is right."

The foregoing testimony of the plaintiff, which shows that he was completely in error as to the "payout" system under the court order of 1952, the plaintiff's exhibit (Traffic Ticket) showing that in the "payout" the violator entered a plea of guilty, not a plea of not guilty, and that the clerk did not have and did not exercise judicial powers under this rule, and did not render a judgment on receiving the waiver and accepting the scheduled fine. From the plaintiff's own testimony, he was indeed guilty of creating confusion with regard to the disposal of minor traffic cases

in a legal way to the benefit of everybody concerned. The newspaper comments in the editorial and the advertisements were truthful in describing the plaintiff's conduct as to "payouts" and what was said or published constituted a fair comment on an important phase of the appellee's conduct as a Municipal Judge. It should be noted that the editorial which was the subject of the first cause of action also made reference to the plaintiff's actions on "payouts." Payouts are clearly justified under Sections 2938.12 and 2945.12, Revised Code.

With the subject of confusion said to have been created by the conduct of the plaintiff as a traffic judge, in addition to payouts, must also be considered his conduct, as shown by his testimony, in the trial of cases where a defendant was charged with driving while under the influence of intoxicating liquor. These cases, as filed by the prosecutor, were based on the ordinance of the city of Toledo dealing with that subject. This ordinance, insofar as the penalty was concerned, was different from that provided for under state law. Section 4511.99, Revised Code. The state law provides that where a jail sentence is imposed the trial court could not suspend and must enforce three days of such jail sentence. No such limitation is found in the penalty provision of the ordinance. It was the holding of the plaintiff that such difference in penalty made the ordinance unconstitutional, and for that reason seven cases were dismissed and the trials of many others were delayed for over a year until the Supreme Court of Ohio passed on the question in the case of *City of Toledo v. Best*, 172 Ohio St. 371, where, when decided, the Supreme Court overruled this plaintiff's contention. The other Municipal Judges were in complete accord with each other and in direct disagreement with plaintiff in holding the ordinance unconstitutional. A trial court has the obli-

gation of following the decisions of the reviewing courts on questions of law pertinent to a case in the process of trial. The identical question, that is, whether a difference in penalty between an ordinance of a city and that of a state law dealing with the same subject is unconstitutional, was decided by the Supreme Court of Ohio in the case of *Village of Struthers v. Sokol,* 108 Ohio St. 263, and also in the case of *City of Dayton v. Miller,* 154 Ohio St. 500, which latter case was followed in the *Best* case. There was no legal reason that could possibly justify the position of the plaintiff in handling prosecutions for driving while intoxicated, which, under the circumstances, cause confusion and was a proper subject to report in the public press.

An examination of the editorial and the advertisements shows that comment was made therein on the fact that the plaintiff announced jail sentences after trial or a plea of guilty on several traffic violators where such penalty was not provided by the ordinance defining the violation charged. When the mistake was called to the plaintiff's attention, and after some argument, he crossed out such entries on his trial docket and substituted a sentence coming within the provisions of the ordinance defining the violation charged. Several pages of plaintiff's trial docket are in evidence. They show the imposition of the jail sentences where the ordinance under which the charge was made, as shown by the affidavit of the arresting officer, did not provide such penalty. Certainly a traffic judge must have before him the affidavit conferring jurisdiction upon the court in a particular case and upon which the case must be tried and is charged with knowledge of the penalty that can be imposed. Such fact must be clearly within his knowledge where jail term is announced upon the imposition of sentence where the ordinance provides for only a fine and costs. Such conduct may be the subject of fair

comment by the press where the basis of such comment is, in fact, true. Certainly such comment, under the circumstances, could not be the subject of a libel action.

The editorial and advertisements commenting on the action of the plaintiff in dealing with three citizens who had been called for jury duty to serve in cases then to be tried by the plaintiff will now be considered.

In one case the juror requested that he be excused because of serious illness which resulted in the death of the juror's father-in-law within a day of the time the request was made. The plaintiff refused the first request because it was said to be not a legitimate ground for avoiding jury service. Even after the juror's father-in-law had died, the juror's request to be excused was refused although the court was informed of his death, and not until the court read the death notice in the paper and the juror compelled to testify under oath to the fact of his father-in-law's death was the juror excused.

The circumstances regarding a lady juror who had been called for service and taken into custody on a citation issued by the plaintiff are that she claimed to have been excused from service by the plaintiff upon her request and claimed to have given him the summons. After she heard the police were looking for her, she voluntarily appeared with her lawyer and was put under a $50 bond to insure her appearance the next day (there is no legal provision for such a bond) and, because the citation was not properly withdrawn, was confined in jail until she could be fingerprinted. This humiliation unnecessarily imposed upon her resulted from the failure of the plaintiff to withdraw the citation.

In the remaining incident, the juror called had been in an automobile accident and was at the time here related at home in bed under traction as ordered by her

physician. Her physician had written the court of her disability to serve as a juror. The summons was served for duty on the fourth of May 1961. The jurors who reported for duty on that day were ordered to return for duty on May 10th. This juror, not then being present, knew nothing of the change of time for service and, not appearing, the judge issued a citation for her to be brought before the court. The bailiff, however, did not serve the citation but went to her home in his automobile and helped her into court where she was compelled to take the witness stand and under oath testify as to her condition. The printed story on this incident states that she was brought into court on a stretcher. This statement was not in accord with the facts but came about because the juror called her lawyer about the telephone call from the bailiff and his reply to her was not to go to court "unless they send for you in an ambulance and take you into court on a stretcher." This error, on the facts, is unimportant. She also displayed a copy of her physician's letter to the court clerk stating that she could not serve as a juror. She was then excused from jury duty. The plaintiff testified that this prospective juror signed his nominating petition following the foregoing incident. Her testimony on that subject is as follows as introduced by the plaintiff:

"Q. I see. By the way did you subsequently to that sign his petition for re-election?

"* * *

"A. A party came out to my place of employment and asked me to sign his petition because Mr. Driscoll didn't want me to be disturbed with him. It seems as if there was some reason as to why they was trying to follow me because—

"* * *

"A. I signed the petition."

This was unquestionably done for campaign purposes.

Some claim is made by the plaintiff that the defendant failed to publish a retraction of some of the matters contained in the various news stories published of and concerning the plaintiff, which stories ultimately became the basis of the editorial of November 2, 1961, and the two advertisements which are the background of plaintiff's three causes of action. Plaintiff's letter asking for "a retraction of the misrepresentation and publish the corrections before greater misunderstanding occur" was mailed to the defendant on November 2nd. The substance of the letter preceding the conclusion which is here quoted consists of a denial that he ever ordered a woman juror brought into court on a stretcher; that he had ever had a prospective juror fingerprinted; or that he had ever imposed workhouse sentences contrary to law.

The letter, a plaintiff's exhibit, shows that the plaintiff failed to comply with Sections 2739.13 to 2739.16, inclusive, of the Revised Code, by setting forth, in a statement in proper language, "the truth pertaining to such statement" which statement must be on the oath of the person making the demand. For plaintiff's failure to comply with statutory requirements in making such demand, the defendant was under no legal duty to publish plaintiff's request.

Coming now to the remaining assignments of error, we find that assignments of error numbers six and seven (that the judgment is excessive due to passion and prejudice) are well taken and, therefore, sustain such claims. As to assignment of error number eight, while there is substance in the record that would have justified acting favorably on a motion to withdraw a juror and reassign the case for a new trial, yet due to the final order of this court, this assignment of error is overruled. This is

equally true of assignments of error numbers nine, ten and eleven, dealing with the admission and rejection of evidence and denying defendant a fair trial. These assignments of error are, therefore, overruled. Assignment of error number twelve deals with plaintiff's request for special instructions before argument. Request No. one was clearly erroneous. Such charge was improper under the *Times* and *Garrison* cases as is true of requested instructions Nos. three and six. Instruction No. seven was incorrect on the subject of burden of proof and was inapplicable under the facts of this case. Also, it confined the jury's consideration to the plaintiff's evidence and was, therefore, prejudicially erroneous. Request No. nine assumes that the plaintiff had been damaged. Such an instruction is improper on the facts that are the basis of plaintiff's claim. Instruction No. eleven deals with express malice. If what was intended was clearly stated, it might be a proper definition of express malice. This instruction is inartfully drawn but probably not prejudicial except as it is considered with other requests clearly erroneous. The evidence in this case does not support assignment of error number twelve. *Richard v. Hunter,* 151 Ohio St. 185. Of the special requests presented by the defendant (fourteen in number), only four were given. Certainly defendant's request to charge number one, dealing with the failure to retract statements appearing in its publications, under the evidence in this case, should have been given. Requested instruction No. six, dealing with the degree of proof necessary to establish actual malice where the statement was a proper subject of comment, except for actual malice, is constitutionally privileged and a proper statement of the law. Its refusal constituted prejudicial error. As stated above, the plaintiff's instruction on this subject, as given, was an incorrect statement of the law.

The remaining requests of the defendant for instructions before argument were, in the main, correct statements of the law dealing with issues presented in this case, but coming to the conclusion that the judgment must be reversed and final judgment entered for the defendant, we need not deal further with them.

In the court's general charge, in addition to errors defining the burden of proof and the degree of proof required to determine actual malice where the defendant claims that what was published was privileged under the First Amendment of the Constitution of the United States (the *Times* and *Garrison* cases, *supra*), the court erroneously submitted the question of whether the editorial and advertisements were libelous per se and the claim of privilege to the jury where there was no dispute about the facts published. In *Mauk v. Brundage*, 68 Ohio St. 89, the second paragraph of the syllabus reads as follows:

> "In an action for libel the question whether the publication is or not libelous *per se* is a question for the court. And where the publication is claimed to be privileged the question whether or not the occasion gives the privilege, the controlling facts being conceded, is also for the court."

See, also, *Williams v. P. W. Publishing Co.*, 76 Ohio Law Abs. 404.

We hold that the judgment is not sustained by the evidence under the law of *New York Times Co. v. Sullivan*, 376 U. S. 254.

A careful study of the record and the publications complained of by the plaintiff shows that the substance of these articles under no circumstances constitutes libel per se. There is no suggestion in the evidence that the defendant acted maliciously to defame the plaintiff. The things that were said of him were substantially true, and his acts

in respect thereto were the subject of fair comment on the conduct of a public officer seeking election to a public office to which he had been appointed. Section 2739.02, Revised Code.

The judgment is reversed and final judgment entered for the defendant.

Judgment reversed.

SILBERT, *C.J.*, and CORRIGAN, *J.*, concur.

SILBERT, *C.J.*, SKEEL and CORRIGAN, *JJ.*, of the Eighth Appellate District, sitting by designation in the Sixth Appellate District.

JOURNAL ENTRY OF THE COURT OF APPEALS OF LUCAS COUNTY, OHIO.

(Filed January 4, 1966.)

This cause came on to be heard upon appeal on questions of law, assignments of error, bill of exceptions, transcript of the docket and journal entries in the Court of Common Pleas of Lucas County, Ohio and briefs, and was argued by counsel and submitted to the Court.

Under date of September 30, 1965, this Court announced its decision herein in favor of appellant. Appellee thereupon filed his application for reconsideration and the Court, being duly advised in the premises, finds that said application should be and it is hereby overruled.

Upon consideration this Court finds that in the record and proceedings aforesaid there is error manifest upon the face of the record to the prejudice of the appellant, as more fully set forth in the opinion of the Court filed herein, in that the verdict and judgment deprive appellant of

its constitutional right to freedom of speech and freedom of the press guaranteed by the First and Fourteenth Amendments of the Constitution of the United States and Section II of Article I of the Constitution of Ohio; that the verdict and judgment are contrary to the law and the evidence; that the trial court erred in refusing to grant the motion of appellant for judgment in its favor at the conclusion of all the evidence; that the trial court erred in overruling appellant's motion for judgment notwithstanding the verdict; that the trial court erred in overruling appellant's motion for a new trial; that the amount of the verdict is excessive; that the jury under the influence of passion and prejudice awarded excessive damages; that the trial court erred in giving to the jury special instructions requested by appellee numbered 1, 3, 6, 7, 9, 11 and 13; that the trial court erred in not giving to the jury before argument special instructions requested by appellant numbered 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 15 and 16; that the trial court erred in its general instructions to the jury; that the verdict and judgment are not sustained by sufficient evidence; and, that the trial court erred in entering judgment for appellee when judgment should have been entered for appellant.

The Court further finds that while there is substance in the record supporting error assignments numbered 8, 9, 10, and 11, yet due to the final order of this Court said assignments of error are overruled.

It is therefore considered, ordered, and adjudged by this Court that the judgment of the Court of Common Pleas of Lucas County be and the same is hereby reversed and held for naught. And the Court coming now to render the judgment which the Court of Common Pleas of Lucas County ought to have rendered, final judgment is now entered in this Court for the appellant.

It is further ordered that this cause be remanded to the Court of Common Pleas of Lucas County, Ohio, to carry this judgment into effect.

It is further ordered that the appellee pay the costs of these proceedings, taxed at $1,454.45 which includes the cost of the original bill of exceptions and of which appellant has advanced $1,182.00 including the cost of the original bill of exceptions and which appellant is allowed to recover and for which judgment is entered.

To the foregoing findings and orders, the appellee is allowed his exceptions.

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO DISMISSING APPEAL.

(June 8, 1966.)

This cause, here on appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO OVERRULING MOTION TO CERTIFY RECORD.

(June 8, 1966.)

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO DENYING REHEARING.

(July 20, 1966.)

It is ordered by the court that rehearing in this case is denied.

STATUTES.

Ohio Revised Code, Section 2309.59 *Reviewing court to disregard certain errors.*

In every stage of an action, the court must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. No judgment shall be reversed or affected by reason of such error or defect. In the judgment of any reviewing court upon any appeal in any civil action, when it is sought to reverse any final judgment or decree or obtain a new trial upon the issues joined in the pleadings, such reviewing court shall certify on its journal whether or not in its opinion substantial justice has been done the party complaining, as shown by the record of the proceedings and judgment under review. In case such reviewing court determines and certifies that in its opinion substantial justice has been done to the party complaining as shown

by the record, all alleged errors occurring at the trial shall by such reviewing court be deemed not prejudicial to the party complaining and shall be disregarded, and such judgment or decree under review shall be affirmed, or it shall be modified if in the opinion of such reviewing court a modification thereof will do more complete justice to the party complaining. In case such reviewing court determines and certifies that in its opinion substantial justice has not been done to the party complaining as shown by the record, such court shall proceed as provided in section 2505.37 of the Revised Code. (Italics supplied.)

Ohio Revised Code, Section 2313.16 *Juror may be excused.*

Except as provided by section 2313.13 of the Revised Code, the court of common pleas shall not excuse a person, liable to serve as a juror and drawn and notified, unless it is shown by the oath of the juror, or if he is unable to attend, by the oath of another person acquainted with the facts, that:

(A) He is then necessarily absent from the county, and will not return in time to serve;

(B) The interests of the public, or of the juror, will be materially injured by his attendance;

(C) He is physically unable to serve;

(D) His wife, or a near relative of himself or his wife, has recently died or is dangerously ill.

When a person liable to serve is excused, in a case specified in this section, or when a person notified to attend a term as a juror is entitled to and claims an exemption, he can be excused only by the judge presiding at the term which he has been notified to attend. Such an excuse shall not extend beyond that term.

Ohio Revised Code, Section 2313.17 *Excuse presented in open court.*

A person who has been notified to attend as a juror and who makes application to be excused as provided by section 2313.16 of the Revised Code, on the ground that he is not qualified, or is exempt, shall present his excuse in open court to the judge. If such person cannot personally attend, he shall send his excuse by a person capable of making the necessary proof in relation to his claim to be excused. A note of the excuse and of the reason therefor shall be made and attested by the court, and shall be transmitted to the commissioners of jurors by the clerk of the court of common pleas, as part of the return made, as prescribed in sections 2313.01 to 2313.46, inclusive, of the Revised Code.

Ohio Revised Code, Section 2317.04 *Impartial report of proceedings privileged.*

The publication of a fair and impartial report of the proceedings before state or municipal legislative bodies, or before state or municipal executive bodies, boards, or officers, or the whole or a fair synopsis of any bill, ordinance, report, resolution, bulletin, notice, petition, or other document presented, filed, or issued in any proceeding before such legislative or executive body, board, or officer, shall be privileged, unless it is proved that such publication was made maliciously.

Ohio Revised Code, Section 2317.05 *Impartial report of indictment, warrant, affidavit, or arrest privileged.*

The publication of a fair and impartial report of the return of any indictment, the issuing of any warrant, the arrest of any person accused of crime, or the filing of any

affidavit, pleading, or other document in any criminal or civil cause in any court of competent jurisdiction, or of a fair and impartial report of the contents thereof, is privileged, unless it is proved that the same was published maliciously, or that the defendant has refused or neglected to publish in the same manner in which the publication complained of appeared, a reasonable written explanation or contradiction thereof by the plaintiff, or that the publisher has refused, upon request of the plaintiff, to publish the subsequent determination of such suit or action. This section and section 2317.04 of the Revised Code do not authorize the publication of blasphemous or indecent matter.

Ohio Revised Code, Section 2739.01 *Libel and Slander.*

In an action for a libel or slander, it is sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff. If the allegation is denied, the plaintiff must prove the facts, showing that the defamatory matter was published or spoken of him. In such action it is not necessary to set out any obscene word, but it is sufficient to state its import.

Ohio Revised Code, Section 2739.02 *Defenses in Actions for Libel or Slander.*

In an action for a libel or a slander, the defendant may allege and prove the truth of the matter charged as defamatory. Proof of the truth thereof shall be a complete defense. In all such actions any mitigating circumstances may be proved to reduce damages.

Ohio Revised Code, Section 2739.13 *Correction of False Statement Formerly Published.*

If any newspaper company, at any time, prints, publishes, or circulates any false statement, allegation, or rumor relating to any individual or association of individuals, or to any trade, labor, business, social, economic, or religious organization or to any firm, corporation, or business, or to any public official or candidate for a public office, such company upon demand of any persons affected or of their representatives, shall print, publish, and circulate any statement or article setting forth in proper language the truth pertaining to such statement, allegation, or rumor, which such persons or their representatives shall offer to such company for publication.

Ohio Revised Code, Section 2739.14 *Publishing corrected statements.*

Whenever demand has been made for the publication of statements or articles under section 2739.13 of the Revised Code, the newspaper company shall print and circulate the same in the next regular issue or within forty-eight hours following the receipt of such statement or article. Such statement or article shall be phrased in proper language and be printed without any additions to, or omissions therefrom, in the same color of ink, from like type, with headlines of equal prominence, occupying a like space in the same portion of the newspaper as was used in printing the original article complained of, and shall be given the same publicity in all respects and, as nearly as possible, the same circulation as such original article. Such company shall print and publish such statements or articles without cost to such persons or their representatives; *and such publication may be proved at*

the trial of a suit for damages as a mitigating circumstance to reduce damages, provided that any voluntary publication made without demand may be used to rebut any presumption of malice or injury on the part of such company growing out of the original publication to which the same related. This section does not prevent the injured party from alleging and proving actual malice on the part of the publisher and any special damages resulting to him therefrom. (Italics supplied.)

Ohio Revised Code, Section 2739.15 *Published Statements Shall Be Sworn To.*

(A) Every statement or article which newspaper companies are required to publish under sections 2739.13 to 2739.18, inclusive, of the Revised Code, shall be sworn to by the person offering the same for publication, but the certificate of the notary or other official showing that the statement was so made under oath, shall not be published.

(B) No person shall willfully swear falsely to any such statement or article and whoever does so, is guilty of perjury.

No newspaper company shall be held liable in any civil or criminal proceedings for anything in any such statement or article.

Ohio Revised Code, Section 2739.16 *Refusal or failure to publish.*

(A) No newspaper company shall refuse or fail to print, publish, and circulate any statement or article if true as required by sections 2739.13 to 2739.18, inclusive, of the Revised Code.

(B) Any person responsible for refusing to print, publish, and circulate any statement or article mentioned

in division (A) of this section shall be fined as provided in division (C) of section 2739.99.

The prosecuting attorney of the county in which such newspaper is published, when complaint is made to him in writing of the refusal or failure of any newspaper company or persons to comply with sections 2739.13 to 2739.18, inclusive, of the Revised Code relative to the publication of such statements or articles, shall investigate said complaint and upon reasonable cause begin proceedings against such newspaper company or person and prosecute the same.

Ohio Revised Code, Section 2938.12 *When accused may be tried in his absence.*

A person being tried for a misdemeanor, either to the court, or to a jury, upon request in writing, subscribed by him, may, with the consent of the judge or magistrate, be tried in his absence, but no right shall exist in the defendant to be so tried. If after trial commences a person being tried escapes or departs without leave, the trial shall proceed and verdict or finding be received and sentence passed as if he were personally present.

Ohio Revised Code, Section 2945.12 *When accused may be tried in his absence.*

A person indicted for a misdemeanor, upon request in writing subscribed by him and entered in the journal, may be tried in his absence by a jury or by the court. No other person shall be tried unless personally present, but if a person indicted escapes or forfeits his recognizance after the jury is sworn, the trial shall proceed and the verdict be received and recorded. If the offense charged is a misdemeanor, judgment and sentence shall be pronounced as if he were personally present. If the offense charged is

a felony, the case shall be continued until the accused appears in court, or is retaken.

Ohio Revised Code, Section 4511.06 *Uniform Application and Precedence of Traffic Law.*

Sections 4511.01 to 4511.78, inclusive, 4511.99 and 4513.01 to 4513.37, inclusive, of the Revised Code shall be applicable and uniform throughout this state and in all political subdivisions and municipal corporations therein, *and no local authority shall enact or enforce any rule or regulation in conflict with such sections.* (Italics supplied.)

Ohio Revised Code, Section 4511.19 *Operation of Vehicle Under Influence of Alcohol or Drugs.*

No person who is under the influence of alcohol, narcotic drugs, or opiates shall operate any vehicle, streetcar, or trackless trolley within this state.

Ohio Revised Code, Section 4511.99 *Penalties.*

(A) Whoever violates section 4511.18 of the Revised Code shall be fined not more than five hundred dollars or imprisoned in the county jail or workhouse not less than thirty days nor more than six months, or both, or imprisoned in the penitentiary not less than one nor more than twenty years.

(B) Whoever violates section 4511.19 of the Revised Code shall be fined not more than five hundred dollars and imprisoned in the county jail or workhouse not less than three days nor more than six months and *no court shall suspend the first three days of any sentence provided for under this section.* (Italics supplied.)

* * * * *

Uniform Traffic Code of the City of Toledo, Ohio. Section 21-6-9 *Operation of Vehicles While Intoxicated; Penalty.*

(a) No person who is under the influence of intoxicating liquor or narcotic drugs, or opiates, shall operate or be in actual physical control of any vehicle, street car or trackless trolley within this city.

(b) Every person who is convicted of a violation of this section shall be punished by a fine of not more than Five Hundred Dollars or imprisonment in the county or municipal jail for not more than six months, or both such fine and imprisonment. (Ord. 37-48.)

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 559.

WILLIAM D. DRISCOLL,

Petitioner,

vs.

TOLEDO BLADE COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

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WILLIAM D. DRISCOLL,

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TOLEDO BLADE COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

JURISDICTIONAL QUESTION.

Respondent respectfully submits that the petition for certiorari filed herein should be denied for the following reasons:

1. The federal question raised by the petition have heretofore been determined by this Court.

2. The federal question raised by the petition has been decided by the state court in accord with the applicable decisions of this Court.

3. The decision of the state court is based on adequate and independent state grounds.

4. There are no special or important reasons for granting the petition. The questions raised by the petition are not of any great public or general interest but are only of interest to the parties involved.

As stated in Rule 19 of this Court, the review is not a matter of right, but of sound judicial discretion, and will

be granted only where there are special and important reasons therefor.

This Court is already overburdened with work and should not be required to apply its valuable time to a case of this kind.

STATEMENT OF CASE.

The petitioner, William D. Driscoll, was a judge of the Toledo Municipal Court, having been appointed on January 11, 1960 by Governor Michael V. Disalle, for an unexpired term, commencing his duties on February 1, 1960. His term ended on December 1, 1961 and at the time of the publications (November 2, 1961 and November 5, 1961) upon which this action is based was a candidate for reelection.

The respondent, Toledo Blade Company, was and is the publisher of the only two daily newspapers published in Toledo, The Blade, an afternoon and evening paper, and the Toledo Times, a morning paper published each morning, Monday through Friday only.

In his amended petition filed in the trial court and upon which the case was tried, plaintiff challenged the truth of statements made in an editorial published in the Toledo Times on November 2, 1961 (Exh. 2) and two political advertisements published in The Blade on November 5, 1961 (Exhs. 3, 5, 6, and TTT). He challenged only the truth of the following statements: (1) the improper imposition of workhouse sentences; (2) his treatment of prospective jurors; (3) his handling of drunk driving cases; (4) his attempts to set aside the payout system; and, (5) his hassles with Court officials.

The action was originally commenced against both the respondent and its president and publisher, Paul Block, Jr. At the conclusion of plaintiff's case the trial court directed

a verdict in favor of Paul Block, Jr. holding that petitioner had made no case against him. Petitioner did not appeal from that judgment.

There were two slight unimportant errors in the editorial, one of which was to the effect that he had ordered a juror brought to the courtroom on a "stretcher" when, in fact, she was not brought in on a "stretcher" but was wearing an orthopedic corset. The author of the editorial, Charles W. Gilmore, editor of the Toledo Times, testified that *at the time he wrote the editorial* he believed the statement to be correct (R. 1083). This is explained by the Court of Appeals in its opinion beginning on the bottom of page 59 of the appendix to the petition for certiorari.

The other slight error appearing in the editorial was the statement that "He once insisted that a juror swear under oath that his father, in fact, had just died." Mr. Gilmore explained this in his testimony (R. 1086, 1087) by saying that it was a "typographical error" and should have been "father-in-law."

There were no other errors in the editorial or in the advertisements. The Court of Appeals correctly held these slight errors to be insignificant. (See statement in opinion on page 60 of Petition for Certiorari.) The Court of Appeals correctly found:

> "A careful study of the record and publications complained of by plaintiff shows the substance of these articles under no circumstances constitutes libel per se. There is no suggestion in the evidence that the defendant acted maliciously to defame the plaintiff. The things that were said of him were substantially true, and his acts in respect thereto were the subject of fair comment on the conduct of a public officer seeking election to a public office to which he had been appointed. Section 2309.02, Revised Code." (Petition for Certiorari, pages 63 and 64.)

Petitioner did improperly impose workhouse sentences on at least six persons. Of these sentences three were vacated by petitioner after his error was called to his attention. Two of the sentences were served in full and one was vacated by petitioner after it had been partially served and petitioner's error was called to his attention by a newspaper reporter.

Petitioner did order a body attachment issued and personally signed the same for the juror Lelia McGrath (Exh. ZZ) directing the police "to have her body before Toledo Municipal Court." As a result she was arrested, taken to the women's cell block in the city jail, where she was booked and fingerprinted (Exh. NNN) like any criminal and her name recorded with other persons charged with such offenses as soliciting and drunk and disorderly conduct.

Petitioner did refuse to excuse the juror, Charles Seibert, until after he read Seibert's father-in-law's obituary notice in the paper and Seibert had sworn that his father-in-law was in fact dead. Petitioner testified that when he was first requested by Seibert to excuse him because of the illness of his father-in-law, he told Seibert, "Your excuse is insufficient" (R. 246), and that on the next occasion when he asked to be excused because of the death of his father-in-law he said "that is insufficient under the circumstances." (R. 376.)

Petitioner did authorize a body attachment for the juror Julia Brown (R. 379, 380, 473), and one was issued, but the bailiff did not serve it because she came in voluntarily after he had exhibited the order (R. 465, 477). At the time she was contacted by the bailiff she was at home in bed in traction as the result of injuries received in an auto accident. With the aid of her mother and daughter she was dressed and slid down the stairs in her home

(R. 464, 465). She called her lawyer who advised her not to go down unless she went in an ambulance on a stretcher (R. 463). However, she did go with the bailiff who assisted her from her home into the courtroom where she was questioned by petitioner under oath and then excused.

The comments concerning his handling of drunk driving cases were essentially acknowledged to be true in paragraph 8 of his amended petition in the trial court and admitted by him at the trial (R. 255-257, 426-427) as well as being established by other testimony.

His attacks on the pay-out system whereby minor traffic offenders could pay fines at the Clerk's office according to a schedule fixed by the Court without the necessity of appearing in court after they had signed a waiver and a written plea of guilty was amply established by petitioner's own testimony (R. 249-252, 356-358, Exh. J).

His hassles with Court officials are also amply supported by the record (R. 233, 257-258, 318-322, 325-326, 335, 347-355, 424-426, 813-824, 841-844, 887-891, 957, 962-965).

The record clearly shows that all of the questioned statements were published by the persons in respondent's organization responsible for their content, in good faith and with the honest belief that they were true.

It is submitted that under the applicable decisions of this Court and the laws of the State of Ohio, the state court correctly entered final judgment for the respondent and that the petition for certiorari should be denied.

THE FEDERAL QUESTION ATTEMPTED TO BE RAISED BY PETITIONER IN THIS CASE HAS HERETOFORE BEEN DETERMINED BY THIS COURT.

The federal question raised by the petitioner in this case is his right to recover damages from respondent for allegedly false and defamatory statements published in respondent's newspapers concerning petitioner who was then a public official and a candidate for election to that office.

This question has heretofore recently been authoritatively determined by this Court in several decisions. The petition raises no new or novel questions.

We direct attention to the following decisions recently made by this Court and which adequately cover the subject: *New York Times Co. vs. Sullivan,* 376 U. S. 254; *Garrison vs. Louisiana,* 379 U. S. 64; *Moity vs. Louisiana,* 379 U. S. 201; *Henry vs. Collins,* 380 U. S. 356; *Henry vs. Pearson,* 380 U. S. 356; and *Rosenblatt vs. Baer,* 383 U. S. 75.

This Court is already heavily burdened with cases involving new and important issues of general public interest. Our case is of interest only to the immediate parties concerned.

Petitioner also attempts to raise some other federal questions but they are without substance and do not merit the attention of this Court.

THE STATE COURT HAS DECIDED ALL FEDERAL QUESTIONS SUBMITTED TO IT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

In attempting to show that the state court decision is probably not in accord with the applicable decisions of this Court, petitioner in his petition unjustly accuses the Court of Appeals of granting "a right or a privilege to a malicious liar to publish, concerning a judge, false, defamatory statements of facts with actual malice" and sanctioning "as fair comment publications of false, defamatory conclusions with actual malice predicated on said false, defamatory statement of facts" (p. 3); distorting "the trial record by including as evidence facts not in the record and by excluding from the record evidentiary facts contained therein" (p. 3); "avoiding and distorting the evidence in the record" (p. 11); indulging "in unwarranted semantics" (p. 17); "the appellate court approves malicious lies and grants to the malicious liar the permission to publish them in contravention of the moral law" (p. 38); "The opinion and judgment of the appellate court shock the universal sense of justice and negate and are repugnant to rational morality" (p. 38); "The distorted opinion of the court of appeals" (p. 38); and "The insidious decision in this case" (p. 38).

He incorrectly refers to the personnel of the defendant by such terms as "malicious liar" (pp. 3, 37, 38).

By reading something into the record which is not there, petitioner attempts to show that the state court distorted the record. In determining the issues the appellate court was required to consider the entire record and not merely isolated statements.

The record will show that the Ohio Court of Appeals gave the case careful consideration. Voluminous briefs were filed. The court allowed the parties additional time for oral argument. Each member of the Court of Appeals

was furnished with a complete copy of the transcript of the proceedings. The transcript contains 1486 pages, in addition to which there were 88 exhibits. The record contains a large volume of prejudicial extraneous matter which helped to obscure the relevant facts, thus probably accounting for the improper jury verdict. The case was argued orally in the Court of Appeals on June 18, 1965. The opinion of the Court of Appeals was not forthcoming until September 30, 1965, showing that the Court carefully considered the record. The opinion appears on pages 39 through 64 of the Appendix to the petition filed herein and demonstrates the care which the Court of Appeals exercised in deciding the case. On October 5, 1965 petitioner filed his application with the Court of Appeals for reconsideration. On December 14, 1965 the Court of Appeals, after careful consideration announced its decision denying the application for reconsideration. The judgment of the Court of Appeals was journalized on January 4, 1966.

The judges of the appellate court are all experienced, able and conscientious judges. Judge Skeel, the author of the opinion, is a recognized authority in the State of Ohio, and the author of books on the subject of Ohio procedure. The opinion is ably written and, together with the journal entry awarding judgment, clearly shows that the Court of Appeals correctly applied the decisions of this Court as well as disposing of the case on adequate and independent state grounds. Petitioner's attack upon that court is wholly unjustified.

That the attack is wholly unjustified is further demonstrated by the decision of the Ohio Supreme Court dismissing petitioner's appeal and denying his motion to certify and for a rehearing.

In determining whether the state court correctly applied the decisions of this Court in the cases above enumerated we must take into consideration what those cases decided. Careful reading of these decisions shows that they establish the following principles:

1. The *First and Fourteenth Amendments* limit the right of the states to award damages in a civil libel suit based upon criticism of official conduct of public officials.

2. They also limit the power of the states to impose criminal sanctions for criticism of the official conduct of public officials.

3. The constitutional guarantees of freedom of speech and of the press apply to the publication of paid advertisements as well as to other publications.

4. A newspaper has no right or duty to censor the contents of paid political advertisments submitted for publication.

5. Libel must be measured by standards that satisfy the *First Amendment.*

6. The constitutional safeguard for speech and the press were fashioned to assure unfettered interchange of ideas for bringing about political and social changes desired by the people.

7. Debate on public issues will not be uninhibited if the speaker runs the risk of being subjected to an award of damages or criminal sanctions if he is unable to prove the truth of his remarks.

8. Speech concerning public affairs is more than self-expression; it is the very essence of self-government.

9. There is a national commitment to the principle that debate over public issues should be uninhibited, robust, and wide-open, and that it may well include vehe-

ment, caustic and sometimes unpleasantly sharp attacks on public officials.

10. The constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is with knowledge that it was false or with reckless disregard of whether it was false or not.

11. In such case the constitutional standard demands that "actual malice" be established by evidence of convincing clarity.

12. Such proof must not only show "actual malice", but it must show that the malice existed at the time the publication was made.

13. Failure to retract the statement is not evidence of "actual malice" at the time of publication.

14. Retraction of the statement at the demand of another party who claims to have been defamed thereby but without retracting it upon the demand of the plaintiff is not evidence of "actual malice" at the time of publication.

15. Falsity of the statement alone is not evidence of "actual malice."

16. Failure of a newspaper to check the accuracy of statements in a publication, against contrary news statements in its own files, is at most negligence and is constitutionally insufficient to show the recklessness that is required for a finding of "actual malice."

17. Mere presence of conflicting news stories in the files of the newspaper does not establish that the newspaper knew that the statements in the publication were false.

18. The knowledge of the falsity or reckless disregard for the truth and the "actual malice" necessary to fix liability on a newspaper must be brought home to the person in the newspaper's organization who was responsible for making the publication.

19. The constitutional protection for free speech and freedom of the press do not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.

20. The constitutional guarantees do not recognize any exception for any test of truth, whether administered by judges, juries, or administrative officials.

21. The punishment of truthful criticism is absolutely prohibited even if made with "actual malice."

22. The burden of proving the truth may not be placed upon the speaker.

23. Erroneous statement is inevitable in free debate and must be protected if the freedoms of expression are to have the "breathing space" they need to survive.

24. Neither factual error nor a combination of factual errors and defamatory content afford any warrant for repressing free speech.

25. Even where the utterance is false the constitutional provisions preclude attachment of adverse consequences to any except the knowing or reckless falsehood.

26. Only false statements made with the high degree of awareness of their probable falsity may be the subject of either criminal or civil sanctions.

27. Even if spoken out of hatred, false utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth and are not actionable.

28. If the person uttering a false statement honestly believes the statement to be true, the fact that his belief was not reasonably founded and that the falsity thereof could have been ascertained by the exercise of ordinary care would not be sufficient to subject him to liability.

29. Injury to official reputation affords no warrant for repressing free speech.

30. Criticism of official conduct of public officials does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

31. Where the criticism is of public officials and their conduct of official business, the fact that the criticism may harm their private reputation as well as their public reputation does not remove it from the constitutional protection.

32. The privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen.

33. It is as much the duty of a citizen to criticize his public officials as it is the official's duty to administer.

34. It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.

From the foregoing it is clear that falsity, knowledge of falsity and malice are not to be lightly inferred. They must be established by evidence of the "convincing clarity which the constitutional standard demands."

When the evidence in this case is considered objectively it cannot possibly support a verdict or judgment for the plaintiff.

Even before the above-mentioned decisions of the United States Supreme Court, the Ohio Supreme Court recognized the value of vigorous discussion of public issues. In *Bigelow vs. Brumley,* 138 Ohio St. 574, 37 N. E. (2d) 584, the Court said on page 579:

> "Upon certain privileged occasions where there is a great enough public interest in encouraging uninhibited freedom of expression to require the sacrifice of the right of the individual to protect his reputation by civil suit, the law recognizes that false, defamatory matter may be published without civil liability."

On page 584 the Court said:

> "Further, in view of the enormous circulation of the official arguments to the electorate as a whole, and the consequent increase in the potential damages recoverable in libel action, the fear of personal consequences would here be much stronger than in the ordinary case, and would the more tend to subdue the arguments. Facts and reasons boldly stated are necessary to give the people the basis of sound action. The importance and the publicity of these official arguments greatly enhance the possibility that a libel suit based upon such statements may be used as a political weapon in a heated campaign over the proposed constitutional change. To permit a court inquiry into the motives behind the statements in the official arguments, by a defamation suit, would destroy much of their value. It must be remembered that the electors will receive the arguments of both sides, a fact which in itself is a protection to the public."

On page 591 the Court said:

> "Free discussion of public issues and the cherished right to criticize political figures, cannot properly be curtailed on the claim that in his private capacity such a political participant pursues a calling in which

even the slightest personal criticism may work him harm."

It is clear that under these decisions our Court of Appeals could not logically have done anything other than enter final judgment for defendant.

THE STATE COURT DID NOT TRY THE CASE DE NOVO.

In questions numbered 3 and 4 on page 3 of the petition and 5(b) on page 4 of his petition, petitioner questions the right of the appellate court to enter final judgment for respondent intimating that the appellate court tried the case de novo. On page 34 he cites Article I, Section 5 of the Ohio Constitution and a number of Ohio cases in support of his contention. Those cases are not applicable here and raise no federal question. One of the cases cited by plaintiff is *Hamden Lodge vs. Ohio Fuel Gas Co.*, 127 Ohio St. 469, 180 N. E. 246. The first three paragraphs of the syllabus are as follows:

> "1. The term 'scintilla,' when used to designate a rule of trial procedure, is confusing and misleading and should be abandoned.
>
> 2. The so-called 'scintilla rule,' requiring a trial judge to submit a case to the jury if there is any evidence, however slight, tending to support each material issue, no longer obtains in Ohio. (Second and third paragraphs of the syllabus in *Ellis & Morton v. Ohio Life Insurance & Trust Co.*, 4 Ohio St., 628, and the case of *Clark v. McFarland*, 99 Ohio St., 100, overruled.)
>
> 3. Upon motion to direct a verdict the party against whom the motion is made is entitled to have the evidence construed most strongly in his favor. But if upon any essential issue, after giving the evidence such favorable construction, reasonable minds

can come to but one conclusion and that conclusion is adverse to such party, the judge should direct a verdict against him."

In *Penny Co. vs. Robison*, 128 Ohio St. 626, 193 N. E. 401, the Ohio Supreme Court held:

"6. Under our law it is just as pernicious to submit a case to a jury and permit the jury to speculate with the rights of citizens when no question for the jury is involved, as to deny to a citizen his trial by jury when he has the right."

It will be noted that in our case the State Court based its decision mostly upon plaintiff's own admissions (see statements on pages 55, 56, 57, 58, and 60 of Appendix to Petition) and the uncontroverted documents received in evidence (Appendix to Petition, pages 54, 56, and 58). The Court of Appeals said:

"A careful study of the record and the publications complained of by the plaintiff shows that the substance of these articles under no circumstances constitutes libel per se. There is no suggestion in the evidence that the defendant acted maliciously to defame the plaintiff. The things that were said of him were substantially true, and his acts in respect thereto were the subject of fair comment on the conduct of a public officer seeking election to a public office to which he had been appointed. Section 2739.02, Revised Code."

The case of *Winkler vs. City of Columbus*, 145 Ohio St. 39, 77 N. E. (2d) 461 is in point. In that case the Court held:

"Where, in an action for personal injury, plaintiff's testimony amounts to an admission that she was guilty of negligence at the time and place, which contributed directly to her injury, it is the duty of the trial court to sustain a motion for a directed verdict in favor of defendant. (Paragraph four of the syllabus of *New*

York Central Rd. Co. v. Stevens, Admr., 126 Ohio St., 395, approved and followed.)"

On page 33 the Court said:

"We are of the opinion that the Court of Appeals labored under a misapprehension as to the quality of the evidence adduced from plaintiff while on the stand. Evidently the court's attention was not called to the fact that plaintiff's answers on cross-examination constitute admissions against interest or as it is sometimes called, judicial admissions.

"The Court of Appeals assumed that because plaintiff testified one way in chief and contrarily on cross-examination, the case should be left to the jury to choose between her conflicting statements. That would be proper in the case of an ordinary witness, but where the testimony involved is that of the plaintiff and the plaintiff's testimony whether in chief or cross-examination, discloses negligence on the part of plaintiff contributing directly to her injury the *fact* has been settled and the matter becomes a question of law to be determined by the court."

See also *Leighton vs. The Hower Corporation*, 149 Ohio St. 72, 77 N. E. (2d) 600; *New York Central Rd. Co. vs. Stevens*, 126 Ohio St. 395, 185 N. E. 542; *E. Kahn's Sons Co. vs. Ellswick*, 122 Ohio St. 576, 172 N. E. 668; *C. C. C. & St. L. Ry. Co. vs. Lee*, 111 Ohio St. 391, 145 N. E. 843.

The Court of Appeals in our case followed the proper rules and entered final judgment for defendant.

In *Moore vs. P. W. Publishing Co.*, 3 Ohio St. (2d) 183, 209 N. E. (2d) 412 the Ohio Supreme Court reversed a judgment for plaintiff and entered final judgment for defendant in a libel action.

THE DECISION OF THE OHIO COURT RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

The opinion of the state court (Appendix to Petition pp. 39-64), as well as the Petition for Certiorari, both clearly show that, while that court considered and applied the applicable federal law in deciding this case, it also rested its decision on independent and adequate state grounds.

It will be noted that most of the authorities cited by petitioner are Ohio court decisions, constitutional provisions, statutes and ordinances.

The state court found that the statements made concerning petitioner were substantially true (p. 63) and applied Ohio Revised Code, Section 2739.02 to this finding in the third syllabus (p. 39). That section reads as follows:

> "In an action for a libel or a slander, the defendant may allege and prove the truth of the matter charged as defamatory. Proof of the truth thereof shall be a complete defense. In all such actions any mitigating circumstances may be proved to reduce damages."

Actually, this statute places a heavier burden upon the respondent than that required by the applicable decisions of this Court which hold that it is necessary for the plaintiff to prove the known or reckless falsity of the statement. Yet, the state court found that the respondent had met the test of the stricter Ohio law.

Also, the degree of proof required to establish a fact is a matter of state law. On pages 32 and 33 of petitioner's brief, he argues that by requiring proof beyond a preponderance of evidence the state court changed the state law with regard to the degree of proof required and held that he had not met that burden. This is a state question, not a federal question.

The state court also held that the verdict and judgment deprived respondent of its constitutional right to freedom of speech and freedom of the press guaranteed by Section 11, of Article I of the Constitution of Ohio. (See page 45 of opinion, Specification of Error No. 1 and judgment of Court of Appeals, pp. 64 and 65.)

Respondent's specifications of error numbered 2, 3, 4, 5, 6, 7, 12, 13, 14, and 15 (pp. 45 and 46) decided favorably to respondent by the state court in its judgment entry (pp. 64 to 66) also involved state questions rather than federal questions.

The state court decision clearly shows that it rests on independent and adequate state grounds.

In *Henry vs. Mississippi,* 379 U. S. 443, this Court said on page 446:

> "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions."

In *Herb vs. Pitcairn,* 324 U. S. 125, this Court said, beginhing on page 125:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock v. Memphis,* 20 Wall. 590, 636; *Berea College v. Kentucky,* 211 U. S. 45, 53; *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U. S. 157, 164; *Fox Film Corp. v. Muller,* 296 U. S. 207. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they in-

correctly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

In *Honeyman v. Hanan,* 300 U. S. 14, the Court said on page 18:

"Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. *Lynch v. New York ex rel. Pierson,* 293 U. S. 52, 54, and cases there cited. Whether these requirements have been met is itself a federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record. A certificate or statement by the state court that a federal question has been presented to it and necessarily passed upon is not controlling. While such a certificate or statement may aid this Court in the examination of the record, it cannot avail to foreclose the inquiry which it is our duty to make or to import into the record a federal question which otherwise the record wholly fails to present."

In *Mental Hygiene Dept. v. Kirchner,* 380 U. S. 194, the Court said beginning on page 196:

"The California Supreme Court did not state whether its holding was based on the Equal Protection Clause of the Fourteenth Amendment to the Constitution of

the United States or the equivalent provisions of the California Constitution, or both. While we might speculate from the choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the judgment of the state court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent non-federal ground. This court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case. Were we to assume that the federal question was the basis for the decision below, it is clear that the California Supreme Court, either on remand or in another case presenting the same issues, could inform us that its opinion was in fact based, at least in part, on the California Constitution, thus leaving the result untouched by whatever conclusions this Court might have reached on the merits of the federal question."

These decisions are applicable here and establish that the petition should be denied.

ALLEGED INACCURACIES IN PUBLICATIONS.

There is perhaps one other contention of plaintiff that deserves some passing mention. Plaintiff claims that there were certain inaccuracies in the statements contained in the publications. The Court of Appeals specifically found such inaccuracies as were present to be of no consequence and did not make the publications libelous. This is in accord with the general authority on the subject. It is a matter of state law. The Courts have frequently held that immaterial factual errors do not make statements "false" as applied to the law of libel. *New York Times Co. vs. Sullivan*, 376 U. S. 254; *Torski vs. Mansfield Journal Co.*,

100 Ohio App. 538, 137 N. E. (2d) 679; *Hearne vs. De Young,* 119 Cal. 670, 52 Pac. 150; *Jackson vs. Pittsburgh Times,* 152 Pa. St. 406, 25 A. 613; *Friedell vs. Blakely Printing Co.,* 163 Minn. 226, 203 N. W. 974; *Clark vs. Bullock,* 28 S. W. (2d) 991 (Ky. 1930); *Leininger vs. New Orleans Item Pub. Co.,* 156 La. 1044, 101 So. 411; *Smith vs. Byrd,* 225 Miss. 331, 83 So. (2d) 172; *Houston Press vs. Smith,* 3 S. W. (2d) 900 (Tex. Civ. App.); *Fairbanks Publishing Co. vs. Pitka,* 376 P. (2d) 190 (Alaska); *Heuer vs. Key,* 15 C. A. (2d) 710, 59 P. (2d) 1063; *Glenn vs. Gibson,* 75 Cal. App. (2d) 649, 171 P. (2d) 118; *Emde vs. San Joaquin County Central Labor Council,* 23 Cal. (2d) 146, 143 P. (2d) 20; *Wilson vs. United Press Assn.,* 343 Ill. App. 238, 98 N. E. (2d) 391; *Addington vs. Times Publishing Co.,* 138 La. 731, 70 So. 784; *Layne vs. Tribune Co.,* 108 Fla. 177, 146 So. 234; *McCormick vs. Miami Herald Publishing Co.,* 139 So. (2d) 197 (Fla. Sup. Ct.).

In our case there were no inaccuracies which changed the import of the publications. The gist of the publications was that plaintiff's official conduct made him unsuitable to hold a judicial office. A strictly accurate report would not have made the sting any less.

As to any inaccuracies in the publications, the words of Mr. Justice Rutledge in his concurring opinion in *Pennekamp vs. Florida,* 328 U. S. 331, beginning on page 371 are applicable:

> "But if every newspaper which prints critical comment about courts without justifiable basis in fact, or withholds the full truth in reporting their proceedings or decisions, or goes even further and misstates what they have done, were subject on these accounts to punishment for contempt, there would be few not frequently involved in such proceedings. There is perhaps no area of news more inaccurately reported

factually, on the whole, though with some notable exceptions, than legal news."

He recognized that newspapers were conducted by laymen who had difficulty in understanding the significance of legal events, procedures and opinions. He then said:

> "In view of these facts any standard which would require strict accuracy in reporting legal events factually or in commenting upon them in the press would be an impossible one. Unless the courts and judges are to be put above criticism, no such rule can obtain. There must be some room for misstatement of fact, as well as for misjudgment, if the press and others are to function as critical agencies in our democracy concerning courts as for all other instruments of government.
>
> "Courts and judges therefore cannot be put altogether beyond the reach of misrepresentation and misstatement. That is true in any case, but perhaps more obviously where the judiciary is elective, as it is in most of our states, including Florida."

Under the circumstances plaintiff has no justifiable complaint regarding the minor inaccuracies which may have been present in the publications.

CONCLUSION.

To summarize our argument, it is our contention that the judgment of the state court is correct and the petition for certiorari should be overruled.

The federal question attempted to be raised by petitioner in this case has already been completely and authoritatively determined by this Court.

The state court has correctly interpreted and applied the decisions of this Court.

The decision of the state court affirmatively shows that its decision rests on independent and adequate state grounds and not only on the decision of the federal question.

The statements made in the publications concerning petitioner were substantially true. Such minor inaccuracies as appeared were immaterial and had no bearing on the issues.

The petition fails to state any new or novel question which has not already been decided by this Court. The issues have no great public interest but are of interest to the parties only. There are no special or important reasons for granting the petition.

To grant the petition would only unnecessarily burden this Court with work, when the Court is already overburdened.

The decision of the state court was correct and should be allowed to stand. The petition for certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 559.

WILLIAM D. DRISCOLL,

Petitioner,

vs.

TOLEDO BLADE COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF
On Petition for Writ of Certiorari to the Supreme Court of Ohio.

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PETITIONER'S REPLY BRIEF

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ISSUE.

The issue in this cause is whether a judge has a constitutional right under the Fourteenth Amendment to the Constitution of the United States to a judgment on a verdict against a publisher for false defamatory statements concerning him in his profession and published with actual malice, that is, with knowledge that they were false or with reckless disregard of whether they were false or not, as provided in *New York Times Co. v. Sullivan*, 376 U. S. 254.

This issue has not been decided against petitioner by any federal decisions cited by the respondent.

RESPONDENT'S DEFENSE.

The apparent defense of the respondent to the petition for writ of certiorari is that the opinion and judgment of the appellate court entering final judgment for the publisher is sacrosanct and is not subject to criticism or review by this Court notwithstanding that they are a perversion of the evidence and the law and violate the constitutional rights of the petitioner guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

The personnel of the appellate court in this instance was from the district for Cleveland, Ohio, and sat by designation in this case.

The record and opinion in this case show the diabolical influence of the press on the judiciary, similar to that in *Sheppard v. Maxwell,* 384 U. S. 333.

PRECEDENT FOR EXAMINATION OF RECORD.

In this regard this Court stated in a long line of cases that when constitutional standards are involved this Court will examine the whole record. This Court stated in Footnote 26 to *New York Times Co., supra,* that the Seventh Amendment to the Constitution of the United States does not preclude an examination of the facts in the case. This Court stated at 376 U. S. 285:

> "26. The Seventh Amendment does not, as respondent contends, preclude such an examination by this Court. That Amendment, providing that 'no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law,' *is applicable to state cases coming here.* Chicago, B. & Q. R. Co. v. Chicago, 166 US 226, 242-243; cf. The Justices v. Murray, 9 Wall. 274. But its ban on re-examination of facts does not preclude us from determining whether governing

rules of federal law have been properly applied to the facts. '*(T)his Court will review the findings of fact by a state court * * * where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.*' Fiske v. Kansas, 274 US 380, 385-386. See also Haynes v. Washington, 373 US 503, 515-516." (Emphasis supplied.)

One can conjecture the questionable motivations of the respondent, particularly in that respondent objects to a review of the record by this Court and argues therefor that there is no important reason for review in the face of the opinion of the appellate court (Respondent's Answer, page 1), which opinion is challenged in that it is a perversion of the record.

Respondent further defends, with doubtful solicitude, on the grounds that this Court is overburdened (Respondent's Answer, page 2), and besides "The transcript contains 1486 pages in addition to which there are 88 exhibits." (Respondent's Answer, page 8.) In this connection, it should be observed that the respondent ordered the transcript to consist of every word uttered from the call of the case to dismissal of the jury, including such irrelevancies as the voir dire examination, the court's instructions to the spectators, opening statements, arguments on motions, and final arguments. Of the 88 exhibits, respondent introduced 73. In victimizing the petitioner by the further application of the law of attrition, the respondent submitted a brief consisting of 240 pages.

Judging from the perverted opinion, the benevolent conclusion is that the appellate court concentrated unwarrantedly on the respondent's contentions in its brief rather than on the record. This is evidenced from the fact

that the jury and trial court who sat, observing and hearing the witnesses, and examined the exhibits as they were introduced, found the publications complained of were defamatory of the petitioner, that they were false, and that they were published with actual malice, that is, with knowledge that they were false or with reckless disregard of whether they were false or not.

The appellate court, on the other hand, contrary to the verdict and judgment of the trial court thereon, and contrary to the testimony and the exhibits, found the publications were not libelous (Opinion of the appellate court, Petition 63), that "There is no evidence that the defendant acted maliciously to defame the plaintiff. The things that were said of him were substantially true." (Opinion of appellate court, Petition 64.) Contrary to its own conclusions, in the same breath, the appellate court found to be false the statement that the plaintiff ordered a prospective woman juror brought into court on a stretcher for which false account the defendant characterized the plaintiff as being brutal.

The appellate court stated (Opinion of appellate court, Petition 60), "The printed story on this incident states that she was brought into court on a stretcher. * * * This error on the facts is unimportant." The appellate court could not avoid the falsity of this published statement since the falsity was admitted publicly in argument and in respondent's brief. Notwithstanding this falsity in the statements complained of, the court found the statements true and therefore reversed the judgment on the verdict for the plaintiff-petitioner and entered final judgment for the defendant-respondent. The appellate court reduced the trial to a matter of taking depositions with the jurors acting as irresponsible spectators.

At page 20 of its answer, the respondent states, under

its heading, "Alleged inaccuracies in publications," "The Court of Appeals specifically found such inaccuracies as were present to be of no consequence and did not make the publication libelous." The appellate court again following the contentions of the respondent substituted the word "inaccuracies" for "falsehoods" and thereby attempts to evade the impact of *New York Times Co. v. Sullivan, supra.*

This Court stated in the *New York Times* case, 376 U. S. 254, at page 285:

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."

We submit the above observation applies with equal force in respect to rights guaranteed to the petitioner by the Fourteenth Amendment to the United States Constitution.

UNCONSTITUTIONAL TRIAL DE NOVO.

We submit that the appellate court gave the parties a new trial before the appellate court, depriving him of a jury, purportedly on the record but contrary to the evidence in the record and the law in the case (see Appendix hereto) and the Constitution of the State of Ohio, Article I, Section 5, which provides:

> "*The right of trial by jury shall be inviolate,* except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." (Emphasis supplied.)

Pertinent to the foregoing is the second paragraph of the syllabus in *Gibbs v. Village of Girard* (1913), 88 Ohio St. 34, 102 N. E. 299, which states:

"The right of trial by jury, being guaranteed to all our citizens by the constitution of the state, cannot be invaded or violated by either legislative act or *judicial order or decree.*" (Emphasis supplied.)

As a consequence, the State of Ohio, through its judiciary, here deprived the petitioner of his constitutional rights to property, due process of law and equal protection of the laws guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, which provides in part:

"nor shall any State deprive any person of life, liberty, *or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis supplied.)

We submit that in this case, as in *Sheppard v. Maxwell,* 384 U. S. 333, where a court's conduct is arbitrary, capricious, and unreasonable, such conduct is an abuse of judicial discretion and negates and is repugnant to due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

DEGREE OF PROOF OF ACTUAL MALICE.

Bearing further on the motivations of the appellate courts in this case and in proof that its opinion is a corruption of the record, the appellate court imputes to this Court, the rule of law stated in the third paragraph of the syllabus in the opinion of the Court of Appeals (Petition, 39):

"3. The burden of showing *actual malice* is on the plaintiff where the proof must be sufficiently clear *(beyond the preponderance of the evidence)* to show that the judgment does not constitute a forbidden intrusion in the field of free expression. (New York

Times Co. v. Sullivan, 376 U. S. 254.)" (Emphasis supplied.)

It should be noted that the appellate court would have the trial courts throughout the United States instruct the juries, on the basis of the decision of this Court in *New York Times Co. v. Sullivan*, that only *actual malice* must be proved beyond the preponderance of the evidence, leaving in doubt the degree of proof required in regard to the remaining issues.

The prejudicial error in this, reported for the bench and bar of the United States, is further proof that the appellate court accepted the respondent's contentions rather than the record and the law in the case. In this instance the appellate court ravaged this Court's opinion in *New York Times Co. supra.*

In *New York Times Co. supra*, this Court made the observation, that the evidence there had no probative value in proof of actual malice of the sponsors of the advertisement, that the New York Times Co. printed the advertisements with knowledge of their falsity or with reckless disregard of their falsity, and that Sullivan was identified in the publications. In this regard this Court stated in *New York Times*, 376 U. S. 254 at 285:

> "We must 'make an independent examination of the whole record,' Edwards v. South Carolina, 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.
>
> "Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they

could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support."

It will be noted that not even *New York Times Co.* contended for the application of a rule of evidence beyond the preponderance of the evidence even as to issue of actual malice. In footnote 24 to *New York Times Co.*, 376 U. S. 254, at page 284, it is stated New York Times Co. requested an instruction requiring proof of malice by "a fair preponderance of the evidence."

Jurisdiction of this Court is invoked under Rule 19(a) of the Rules of the Supreme Court of United States, said rule providing for review by this Court on petition for writ of certiorari, "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided in a way probably not in accord with applicable decisions of this court."

IN OHIO THE DEGREE OF PROOF IN A LIBEL CASE IS BY THE PREPONDERANCE OF THE EVIDENCE.

The trial court, in *Westropp v. E. W. Scripps Company*, 148 Ohio St. 365, so charged in Special Instruction No. 9, and the Supreme Court of Ohio found no error on that issue upon review.

Moreover, in *Mauk v. Brundage*, 68 Ohio St. 89, cited by the Court of Appeals in the fourth paragraph of the syllabus in the instant case (Petitioner's Appendix, pp. 39-40), the Supreme Court of Ohio, at page 99, stated the degree of proof in libel is the preponderance of the evidence and so held, as stated in paragraph three of the syllabus in that case.

The cases cited and annotated support the preponderance rule as stated in 34 *Ohio Jur.* 2d, page 308, par. 146, as follows:

> "In accordance with the general rule as to civil actions generally, a preponderance of the evidence is sufficient to establish the facts necessary to entitle the plaintiff to a verdict in a libel or slander action."

21 *Ohio Jur.* 2d, page 721, par. 694, provides as follows:

> "In civil cases the jury deals only with probabilities, and the burden of proof is ordinarily carried by a preponderance of the evidence. In fact, there is no doctrine of the law more firmly settled than the rule which authorizes issues of fact in civil cases to be determined in accordance with the preponderance or weight of the evidence, whether or not it is sufficient to remove all reasonable doubts."

As late as March 2, 1966, while the instant case was pending on application for review by the Supreme Court of Ohio, said court held in *Housesold Finance Corporation v. Altenberg*, 5 Ohio St. 2d, 190, that in all civil cases at law issues of fact shall be determined by the preponderance of the evidence. This decision was called to the attention of the Supreme Court of Ohio in petitioner's application for rehearing. The Supreme Court of Ohio stated, at page 192, in *Household Finance Corporation, supra,*

> "* * * 'there is no doctrine of the law settled more firmly than the rule which authorizes issues of fact in civil cases to be determined in accordance with the preponderance or weight of the evidence.' Jones Stranathan & Co. v. Graves, 26 Ohio St. 2, 4. See, also, Rice v. City of Cleveland, 144 Ohio St. 299."

At page 193, the court further stated,

> "In addition, persuasive practical considerations intervene to prevent this court from expanding the clear and convincing rule to cases not equitable in nature."

CONCLUSION.

Petitioner respectfully requests that this Court apply the principles stated in Footnote 26 and at page 285 in *New York Times Co. v. Sullivan*, 376 U. S. 254, providing for examination of the record to apply the constitutional principles stated in *New York Times Co. supra*, pertaining to petitioner's rights under the Fourteenth Amendment.

Petitioner further requests that upon examination of the true record as contrasted with the appellate opinion, this Court reverse the judgment of the appellate court, sitting by designation for Lucas County, Ohio, and affirm the judgment of the trial court, the Court of Common Pleas, Lucas County, Ohio.

Respectfully submitted,

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and
WILLIAM D. DRISCOLL,
Attorneys for Petitioner.

APPENDIX.

The following is proof that the appellate court in the instant case violated the established law of Ohio in reversing the judgment of the trial court on the verdict and entering final judgment for the respondent.

In 3 *Ohio Jur.* 2d, 805, par. 818, it is stated:

> "There are several reasons for the reluctance of reviewing courts hearing cases on appeal on questions of law to disturb conclusions reached below on questions of fact and the weight of the evidence. The sifting and weighing of evidence and the determination of facts is the duty and function of the triers of the facts, usually a jury but sometimes a trial judge.
>
> "The weight to be given to the conclusions of the triers of the facts and of the trial court passing upon motion for new trial is coupled with the usual presumption which must be indulged in favor of the correctness of the judgment and proceedings under review, and, in determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts; if the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.
>
> "One of the basic reasons underlying the principles relating to review on the weight of the evidence is the great advantage possessed by the jury and the trial court in judging the accuracy, candor, and credibility of witnesses and the weight to be given their testimony, from the fact that they see the witnesses testifying and hear what they say at first hand with full opportunity to observe their appearance, conduct, demeanor, the inflections of the voice, accompanying gestures, etc., while the reviewing court

has before it only the written record of what was said."

Also, in 3 *O. Jur.* 2d, 809, par. 819, it is stated:

"Reversal cannot be had on the ground that the judgment is against the weight of the evidence except as a matter of law. It follows that a judgment will not be reversed on this ground merely because the evidence sustaining it is open to suspicion or does not impress the reviewing court; nor because the reviewing court entertains some doubt as to whether such judgment is in fact supported by the weight of the evidence, is not in full accord with the verdict or finding of fact on which it was rendered, is not satisfied that such verdict is right, or thinks that another jury might arrive at a different conclusion or that a contrary verdict might well have been rendered or that the trial judge might well have set the verdict aside; nor because it has views of its own contrary to those expressed by the jury or the court below, or differs in its opinion as to the facts or as to the inferences to be drawn from the facts proved, or would have rendered a different verdict or decided differently if it had heard the case in the first instance. In order to reverse, the reviewing court must be fully and clearly satisfied from an examination of all the evidence and of the whole record, that the judgment is in fact unsupported by, or against the manifest weight of, the evidence, and the court will not be thus satisfied unless there projects from the record some fact or circumstance indicating that the jury lost its way and went in the wrong direction in reaching its verdict, resulting in error and injustice shocking to the sense and to the conscience of the court, and clearly showing that the jury misapprehended the facts or were influenced by sympathy, bias, prejudice, wilful disregard of duty, perversity, corruption, or other improper motives. In other words, there must be impressed upon the evidence a status which shows that

the conclusion of the jury is unreasonable, improbable, and illogical to such a degree that it is possible to say that the testimony affords no reasonable foundation for the verdict or findings, or that unbiased, unprejudiced minds could not, from the evidence, have reached the conclusion which was reached by the jury or the trial court. Putting the matter in a different way, it has been stated that a reviewing court can reverse a judgment upon an assignment of error involving the weight of the evidence only when the verdict is so manifestly contrary to the natural and reasonable inferences to be drawn from the evidence as to produce a result in complete violation of substantial justice, and that such a court is not authorized to reverse on such ground unless it is justified in inserting in its journal entry that substantial justice has not been done to the complaining party.

"A reviewing court will not disturb the judgment of the trial court on the ground of insufficiency of the evidence unless it clearly appears that the conclusion reached cannot be supported by any rational view of the evidence."

Again, in 3 *O. Jur.* 2d, 817, par. 820, we find:

"Generally, a judgment will not be reversed as against the weight of the evidence if it is supported by any competent, credible evidence which goes to all the essential elements of the case. This rule applies with especial force to cases in the Supreme Court because of the statutory exemption of that court from the duty of weighing the evidence and its practice of refusing to do so.

"The mere fact that the evidence supporting the judgment is weak or unsatisfactory does not require reversal. It has been stated that "some" evidence only is sufficient to sustain the verdict and prevent a reversal if it applies to all the essential elements of the case, at least if there is no indication in the 'record' of bias, mistake, misapprehension, or grave injustice.

"The fact that the testimony of the plaintiff stands alone as to some of the material facts which he was bound to establish in order to recover will not justify a reversal on this ground of a judgment in his favor. Nor will a judgment be reversed because the evidence is of a less satisfactory character than is usually regarded as making out a preponderance, where it is the best evidence obtainable and is such as to be entitled to consideration, particularly where the question is such that the evidence necessarily involves opinions and estimates into which error is likely to creep.

"In this connection it has been remarked that a different degree of evidence is necessary to reverse a case on the ground that the judgment is against the weight of the evidence than is required in the submission of a case to a jury upon the preponderance of the evidence."

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 559.

WILLIAM D. DRISCOLL,
Petitioner,

vs.

TOLEDO BLADE COMPANY,
Respondent.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

JURISDICTION FOR PETITION FOR REHEARING.

This petition is submitted by leave of Rule 58, paragraph 2 of the Rules of the United States Supreme Court which provides therefor where there are intervening circumstances of substantial or controlling effect.

ISSUE.

The petition for writ of certiorari in this case was filed on September 15, 1966, submitting the following salient issues:

1. In a case where the petitioner obtained a verdict and judgment and where it was alleged and proven by the preponderance of the evidence that the defamatory falsehoods were published knowingly, intentionally and deliberately concerning a judge in his profession, does the First Amendment to the United States Constitution regard-

ing freedom of speech and press, as interpreted by this Court in *New York Times Company v. Sullivan,* 376 U. S. 254, vitiate the provisions of the Fourteenth Amendment, Section 1, to the United States Constitution, which guarantees to all persons security in their property, including their reputations?

Petitioner says, no. Respondent says, yes.

2. Did this Court in *New York Times Company v. Sullivan,* 376 U. S. 254, hold, and does this Court now hold, that proof of actual malice must be by a greater weight or degree than the preponderance of the evidence?

Petitioner says, no. Respondent says, yes.

INTERVENING CIRCUMSTANCES.

Intervening the docketing of this case in this Court on September 15, 1966 and dismissal thereof on November 14, 1966, this Court on October 10, 1966 admitted for review *Curtis Publishing Company v. Butts,* Docket No. 37 and *Associated Press v. Walker,* Docket No. 150. Both cases present the same salient issues as in the instant case. In this connection, Rule 23-1(c), pertinent to what issues this Court will consider in a petition for certiorari, provides:

> "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein."

In *Curtis Publishing Company v. Butts,* Docket No. 37, admitted for review on October 10, 1966, the issue presented for review is whether the First Amendment provides immunity for false, defamatory statements published with knowledge that they were false concerning an athletic director, and falsely stating in substance that the said athletic director of a state university gave to a football

coach of another state university confidential information calculated to affect the outcome of a forthcoming football game between the two universities.

The issue accepted for review by this Court on October 10, 1966 in *Associated Press v. Walker*, Docket No. 150, is whether the rule in *New York Times Company v. Sullivan*, 376 U. S. 254, requiring proof of actual malice, that is, that the false and defamatory publication was made with knowledge that it was false or with reckless disregard of whether it was false or not, applies to persons other than public officials.

In all three cases, the *Butts* case, the *Walker* case, and the instant case, there is a confrontation of the rights of publishers of false, defamatory statements published with actual malice—that is, with knowledge that they were false or with reckless disregard of whether they were false or not, as against the provisions of the Fourteenth Amendment, Section 1, to the Constitution of the United States guaranteeing security to all persons in their property, including their reputations.

PRECEDENT FOR REVIEW OF THE RECORD.

The petition for certiorari in the instant case is directed to the Supreme Court of Ohio. In similar cases this Court has held that where constitutional questions are involved, this Court will examine the trial record to determine whether the constitutional standards appear in the record. This Court examined the trial record in *New York Times Company v. Sullivan*, 376 U. S. 254, and stated at page 285:

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."

This Court further stated in footnote 26 to *New York Times Company v. Sullivan*, 376 U. S. 254, at page 285:

"26. The Seventh Amendment does not, as respondent contends, preclude such an examination by this Court. That Amendment, providing that 'no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law,' *is applicable to state cases coming here.* Chicago, B. & Q. R. Co. v. Chicago, 166 US 226, 242-243; cf. The Justices v. Murray, 9 Wall. 274. But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. *'(T)his Court will review the findings of fact by a state court * * * where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.'* Fiske v. Kansas, 274 US 380, 385-386. See also Haynes v. Washington, 373 US 503, 515-516." (Emphasis supplied.)

ARGUMENT.

The impact of *New York Times Company v. Sullivan*, 376 U. S. 254, requires clarification, particularly in relation to the Fourteenth Amendment, Section 1, as to the rights of persons victimized by publishers of defamatory, false publications concerning them in their profession. This is evident from the record and opinion in the instant case. It is evidenced also in the fact of this Court's orders granting review of *Curtis Publishing Company v. Butts*, Docket No. 37, and *Associated Press v. Walker*, Docket No. 150, which cases this Court has bracketed for argument.

The present status of the law of libel is in a state of confusion. In *New York Times Company v. Sullivan*, 376 U. S. 254, at page 279, this Court stated in the opinion by Mr. Justice Brennan:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The question still remains whether the converse of the above proposition is effective, that is, whether a public official has a right of recovery against a publisher of false, defamatory statements published with knowledge that they were false or with reckless disregard of whether they were false or not. This question is in issue in the *Butts* case, *supra*, the *Walker* case, *supra*, and in the instant case.

In the instant case the petitioner alleged and proved by at least the preponderance of the evidence, that the defamatory statements concerning him in his profession as judge were false and were published by the respondent

with knowledge that they were false, that is, with actual malice.

The trial court charged the jury several times that the plaintiff had a right to recover against the respondent only if, by the preponderance of the evidence, they found the respondent published the statements complained of and if they found also, by the preponderance of the evidence, that the statements were defamatory and false concerning the petitioner in his profession and were published by respondent with actual malice—that is, with knowledge they were false or with reckless disregard of whether they were false or not. The jury found for petitioner and the trial court entered judgment on the verdict.

CONCLUSION.

In compliance with part 2 of Rule 58 and because of the intervening decisions of this Court in allowing review of *Curtis Publishing Company v. Butts,* Docket No. 37, and *Associated Press v. Walker,* Docket No. 150, which cases are still pending to be considered by the Court in tandem, as well as the reasons previously advanced in support of the petition for certiorari, it is urged that this petition for reconsideration should be granted, the order denying certiorari should be vacated, and certiorari should be granted for hearing in conjunction with the *Curtis Publishing Company v. Butts* and *Associated Press v. Walker.*

Respectfully submitted,

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Certificate of Counsel.

Pursuant to Rule 58, I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to substantial grounds not previously presented by this petitioner.

WILLIAM D. DRISCOLL.